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136 Fed.Appx. 139, 2005 WL 1332350 (C.A.10 (Utah))
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Curiale v. Walker
C.A.10 (Utah),2005.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.
Joseph CURIALE, Plaintiff-Appellant,
v.
Olene WALKER, Governor of Utah, Defendant-Appellee.
No. 05-4054.

June 7, 2005.

Background: Litigant sued former governor of Utah under § 1983, alleging violations of his civil rights. The United States District Court for the District of Utah dismissed complaint pursuant to in forma pauperis (IFP) statute. Litigant appealed.

Holdings: The Court of Appeals, McConnell, Circuit Judge, held that:

(1) claim that former governor promoted and protected illegal corruption and prostitution of minors was based on fantastic or delusional scenarios, warranting its dismissal as frivolous under IFP statute;

(2) litigant failed to allege violation of legitimate legal interest when he alleged that his neighbors regularly violated privacy of his home and were corrupting children; and

(3) claim that post office had discriminated against litigant was frivolous, warranting its dismissal under IFP statute.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ⚿2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases
Section 1983 claim that former governor of Utah, acting in her official capacity as governor, promoted and protected illegal corruption and prostitution of minors, which rested on plaintiff's belief that waitresses at local restaurant were prostitutes, was based on fantastic or delusional scenarios, warranting claim's dismissal, as "frivolous," under in forma pauperis (IFP) statute. 28 U.S.C.A. § 1915(e)(2)(B); 42 U.S.C.A. § 1983.

[2] Federal Civil Procedure 170A ⚿2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases
Litigant failed to allege violation of legitimate legal interest when, in his § 1983 action against former governor of Utah, he alleged that his neighbors regularly violated privacy of his home and that neighbors were corrupting children, warranting claim's dismissal, as "frivolous," under in forma pauperis (IFP) statute, given that litigant provided no supporting facts and made no reference to former governor's involvement. 28 U.S.C.A. § 1915(e)(2)(B); 42 U.S.C.A. § 1983.

[3] Federal Civil Procedure 170A ⚿2734

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security

170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases
Litigant's § 1983 claim against former governor of Utah, which alleged that post office had discriminated against litigant but provided no supporting facts and established no connection to former governor, was "frivolous," warranting its dismissal under in forma pauperis (IFP) statute. 28 U.S.C.A. § 1915(e)(2)(B); 42 U.S.C.A. § 1983.

***140** Joseph Curiale, Vernal, UT, pro se

Before SEYMOUR, HARTZ, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.MICHAEL W. McCONNELL, Circuit Judge.

****1** Joseph Curiale brought this action against Olene Walker, former governor of Utah, pursuant to 42 U.S.C. § 1983. He alleged various violations of his civil rights. Because we conclude that Mr. Curiale's claims are frivolous under 28 U.S.C. § 1915(e)(2)(B), we **AFFIRM** the judgment of the district court and dismiss the claim.

I. Factual and Procedural Background

Mr. Curiale asserts various claims under 42 U.S.C. § 1983. First, he claims former Governor Olene Walker "promoted and protected illegal corruption and prostitution of adults that allegedly use minors" and "should be considered responsible through the so-called 'chain of command' of having allowed corruption to run amuk [*sic*]" in Utah. Appellant's Br. 3. Second, Mr. Curiale claims his neighbors violate the privacy of his home and corrupt minors.***141** Third, Mr. Curiale claims that the postal service discriminates against him by not delivering mail and packages regularly.

The Court granted Mr. Curiale's motion to proceed *in forma pauperis* on July 2, 2004 and on July 9, 2004, the district court judge referred the case to United States Magistrate Judge Samuel Alba pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Alba recommended that the district court dismiss the case for failure to state a claim upon which relief may be granted and for frivolousness, pursuant to 28 U.S.C. § 1915(e)(2)(B). The district court adopted Magistrate Judge Alba's recommendation and dismissed the complaint. Mr. Curiale appealed.

II. Standard of Review

"We review the district court's § 1915(e) dismissal for abuse of discretion." *McWilliams v. Colorado*, 121 F.3d 573, 574-75 (10th Cir.1997). Mr. Curiale is proceeding pro se, so "the court should construe his pleadings liberally and hold the pleadings to a less stringent standard than formal pleadings drafted by lawyers." *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir.1996). However, a "broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim can be based." *Id.*

III. Discussion

On appeal, Mr. Curiale argues that the magistrate judge and the district court mistakenly dismissed his 42 U.S.C. § 1983 claims. We affirm the dismissal because Mr. Curiale's claims are frivolous under 28 U.S.C. § 1915(e)(2)(B). A court may dismiss an *in forma pauperis* claim at any time if the action or appeal "(i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Frivolous suits include suits based on the alleged infringement of a legal interest which clearly does not exist. *Neitzke v. Williams*, 490 U.S. 319, 328, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Because Mr. Curiale alleges infringement of non-existent legal interests, we affirm the district court's dismissal under § 1915(e)(2)(B).

**2 [1] First, Mr. Curiale claims that Ms. Walker, acting in her official capacity as governor, promoted and protected the illegal corruption and prostitution of minors. However, he alleges no facts to support this claim, other than his belief that waitresses at a certain local restaurant are prostitutes. The connection between these two allegations is so tenuous that the claim is based on " fantastic or delusional scenarios" and was correctly dismissed as frivolous. *Neitzke*, 490 U.S. at 328, 109 S.Ct. 1827.

[2] Second, Mr. Curiale claims his neighbors regularly violate the privacy of his home. Mr. Curiale's fundamental right to privacy in his home is beyond question, *see, e.g., Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), but his claim is supported only by the observation that his neighbors, "step[p]ing into the drivers side of their pick-up van ... [were] not minding their own business." R. Doc. 20 at 4. He alleges no facts that suggest a connection between Ms. Walker and his neighbors' actions. Mr. Curiale similarly alleges that his neighbors are corrupting children. Again, he presents no facts to support this allegation and makes no reference to Ms. Walker's involvement. Each of these claims was correctly dismissed because Mr. Curiale fails to allege a violation of a legitimate legal interest.

[3] Finally, Mr. Curiale claims that the post office discriminated against him because his mail and packages were not consistently**142** delivered to his house. Mr. Curiale also submitted a letter from the U.S. Postal Service stating that the postmaster suspended delivery due to Mr. Curiale's repeated threatening behavior, which may explain why he is not getting his mail. As with his other allegations, Mr. Curiale does not substantiate this claim and offers no connection to Ms. Walker. When last we checked, the Governor of Utah had no authority or responsibility with respect to the delivery of the U.S. mail. Thus, this claim was also rightfully dismissed under § 1915(e)(2)(B).

We agree with Magistrate Judge Alba that " even when construing Plaintiff's claims liberally, the Court cannot decipher any legitimate federal claim, nor can the Court discern any tenable connection between the alleged claims and Defendant." R. Doc. 24 at 6. Therefore, the district court did not abuse its discretion by dismissing each claim under § 1915(e)(2)(B), and the judgment of the United States District Court for the District of Utah is **AFFIRMED.**

C.A.10 (Utah),2005.
Curiale v. Walker
136 Fed.Appx. 139, 2005 WL 1332350 (C.A.10 (Utah))

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT BOATRIGHT,

Plaintiff,

vs.

CIVIL ACTION
No. 05-3183-GTV

LARNED STATE HOSPITAL, et al.,

Defendants.

ORDER

This matter is before the court on a complaint filed under 42 U.S.C. 1983 by a person confined in the Sexual Predator Treatment Program at Larned State Hospital in Larned, Kansas. Having reviewed the record, the court grants plaintiff leave to proceed in forma pauperis under 28 U.S.C. 1915. Because it appears plaintiff is not a "prisoner,"[1] plaintiff incurs no obligation to pay the full $250.00 district court filing fee in this matter, nor is plaintiff required to demonstrate his exhaustion of administrative remedies prior to filing the instant action in federal court. See 28 U.S.C. 1915(b)(prisoner fee obligation) and 42 U.S.C. 1997e(a)(prisoner exhaustion requirement), each as amended by the Prison Litigation Reform Act effective April 26, 1996.

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[1]A "prisoner" is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentence for, or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. 1915(h).

IN THE UNITED STATES DISTRICT COURT
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ORDER

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Nonetheless, because plaintiff proceeds pro se, the court is required to dismiss this action at any time if the court determines it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. 1915(e)(2)(B).[2]

In the complaint, plaintiff seeks damages and injunctive relief on allegations that between August and October 2004 unidentified nursing staff at the Larned facility stole plaintiff's narcotic medication and substituted Tylenol for treatment of plaintiff's pain. Plaintiff claims this conduct, combined with delay and inappropriate attention by other staff to his complaints, constituted deliberate indifference to his serious medical needs.

"To state a claim under [42 U.S.C.] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). It is recognized that "deliberate indifference" to the serious medical needs of a

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[2]Courts have determined that 28 U.S.C. 1915(e)(2)(B) applies to nonprisoners proceeding in forma pauperis. See e.g., Newsome v. Equal Employment Opportunity Commission, 301 F.3d 227, 231-33 (5th Cir. 2002)(affirming dismissal of nonprisoner claims for frivolity and failure to state a claim under 28 U.S.C. 1915(e)(2)(B)(i) and (ii)); Cieszkowska v. Gray Line New York, 295 F.3d 204, 205-206 (2nd Cir. 2002)(affirming dismissal of in forma pauperis non-prisoner case for failure to state a claim pursuant to 28 U.S.C. 1915(e)(2)).

prisoner constitutes cruel and unusual punishment proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). This same "deliberate indifference" standard is applied to circumstances not involving "punishment" under the Eighth Amendment. See Barrie v. Grand County, Utah, 119 F.3d 862, 868-69 (10th Cir. 1997)(claim on behalf of jail detainee suicide is considered under deliberate indifference standard, not objective reasonableness standard of 4th amendment).

However, plaintiff names only "Larned State Hospital" and "Larned State Hospital employees" as defendants in his complaint. The hospital facility itself is not a proper defendant because it is not an entity that can sue or be sued. See e.g., Marsden v. Fed. Bureau of Prisons, 856 F.Supp. 832, 836 (S.D.N.Y. 1994)("jail is not an entity that is amenable to suit"). To seek damages and other relief against any specific hospital employees, plaintiff must identify each defendant sufficiently to allow service of process, and must allege each defendant's personal participation in the deprivation of plaintiff's constitutional rights. See Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997)("Individual liability under 42 U.S.C. 1983 must be based on personal involvement in the alleged constitutional violation."); Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir. 1996)("[P]ersonal participation is an essential allegation in a section 1983 claim.").

Accordingly, the court grants plaintiff an opportunity to amend the complaint to avoid dismissal of the complaint as

stating no claim for relief, 28 U.S.C. 1915(e)(2)(B)(ii). The failure to file a timely response may result in this matter being dismissed without prejudice and without further prior notice to plaintiff.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiff is granted leave to proceed in forma pauperis.

IT IS FURTHER ORDERED that plaintiff is granted twenty (20) days to amend the complaint to avoid dismissal of the complaint as stating no claim for relief.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 9th day of May 2005.

/s/ G. T. VanBebber
G. T. VANBEBBER
United States Senior District Judge

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2005 WL 399300 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.2d)

Hargett v. Adams
N.D.Ill.,2005.
Only the Westlaw citation is currently available.
United States District Court,N.D. Illinois, Eastern Division.
Jeffery HARGETT, et al., Plaintiffs,
v.
Carol ADAMS, et al., Defendants.
No. 02 C 1456.

Jan. 14, 2005.

Everett Joseph Cygal, Michael Patrick Mullins, Schiff, Hardin & Waite, Benjamin S. Wolf, Roger Baldwin Foundation of ACLU, Inc., Chicago, IL, for Plaintiffs.
Steven M. Puiszis, James Constantine Vlahakis, Andrew Michael Ramage, J. William Roberts, Hinshaw & Culbertson, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, J.

I. *INTRODUCTION*

***1** The Plaintiffs, individuals who have been civilly committed under the Illinois Sexually Violent Persons Commitment Act, 725 ILCS 207/1*et seq.* (the "SVP Act"), brought this suit on behalf of themselves and a class of all other similarly situated individuals challenging the conditions of confinement and quality of treatment at the Joliet Treatment and Detention Facility (the "TDF"). The Defendants are the Director of the Illinois Department of Human Services and various officials at the TDF.

Under the SVP Act, an individual who has been convicted (or found not guilty by reason of insanity) of a sexually violent offense may be detained indefinitely at the TDF if he is found to suffer from a "mental disorder that makes it substantially probable that [he] will engage in acts of sexual violence."725 ILCS 207/40(a). The SVP Act defines a mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."725 ILCS 207/5(b). The civil commitment lasts until the individual "is no longer sexually violent." 725 ILCS 207/40(a).

Plaintiffs raise a series of substantive due process constitutional claims that fall under two broad categories: (1) the conditions of confinement are impermissibly restrictive, and (2) the sex offender treatment provided is inadequate. Specifically, Plaintiffs contend, among other things, that the physical structure and layout of the TDF creates a prison-like environment that is counter-therapeutic and inappropriate for the treatment-based nature of Plaintiffs' civil confinement. In addition, Plaintiffs claim that the TDF staff imposes excessive restrictions on personal movement, conducts inappropriate room and personal searches, and improperly uses seclusion as a vehicle for punishment, in violation of accepted professional standards.

Plaintiffs also contend that the treatment provided at the TDF is constitutionally inadequate. They claim that the TDF violates accepted professional standards pertaining to informed consent and access to treatment. Specifically, Plaintiffs are required to sign a consent form that purportedly contains false and misleading statements, as well as a waiver of confidentiality that is excessively broad. Plaintiffs also complain of the TDF's practice of disclosing patient records to the Illinois Attorney General. In addition, Plaintiffs challenge the adequacy of the treatment provided at the TDF, claiming that it relies on ineffective techniques, such as arousal reconditioning and polygraph use, deprives patients of proven efficacious medications, and lacks sufficiently clear goals and requirements for successful completion of treatment. Indeed, Plaintiffs note that in the five-year history of the program, only a handful of patients have been released. Although Plaintiffs challenge the conditions

and treatment at the TDF, they do not mount a facial challenge of the SVP Act itself.

***2** Defendants initially respond that many of Plaintiffs' claims are moot in light of recent changes in policies and practices. They also contend that housing Plaintiffs in a facility that has similarities to a correctional setting does not transform the TDF's program into an essentially punitive program. In addition, Defendants argue that the security measures are reasonable and necessary precautions related to legitimate security needs for both patients and staff. Defendants also contend that the seclusion standards established by psychiatric organizations are not applicable because the patient population at the TDF is different in kind from the type found at psychiatric hospitals, and, moreover, the SVP Act specifically exempts the TDF from complying with the seclusion provisions in the Illinois Mental Health and Developmental Disabilities Code.

With regard to Plaintiffs' treatment-related claims, Defendants argue, among other things, that Plaintiffs merely point to areas of professional disagreement, which cannot amount to constitutional violations. Specifically, Defendants contend that arousal reconditioning and polygraph use are well-established techniques utilized in the treatment of sex offenders. Defendants also note that the treatment program has established goals for progress, and that several patients have been released, even without completing all phases of the treatment.

II. *FINDINGS OF FACT*

A. Claims Pertaining to Conditions of Confinement

The TDF's Physical Structure and Layout

1. The physical structure of the TDF is more-akin to a high-security, prison-like facility, rather than a low-security facility or traditional mental health treatment facility. Plaintiffs' correctional facilities expert, Steve Martin, presented credible testimony showing certain functional similarities between the TDF and high-security facilities, including numerous guard and observation posts, a central security system, continually-locked doors, small prison-like rooms, invasive searches and significant restrictions on movement.

2. Plaintiffs' expert Dr. Metzner presented credible testimony showing that the TDF's physical layout was not conducive to a positive therapeutic milieu. Dr. Metzner, however, also conceded that effective psychotherapy can-and often does occur-in correctional environments that are significantly more restrictive and prison-like than the one at the TDF. Similarly, Dr. Berlin, Plaintiffs' expert, conceded that effective psychotherapy can occur within a prison setting.

3. Thus, the Court finds by a preponderance of the evidence that although the physical structure of the TDF does not facilitate a positive therapeutic environment, it is not, by itself, a significant impediment to the delivery of effective treatment. As indicated below, other elements of the treatment program overcome the counter-therapeutic features of the TDF's physical structure.

Restrictions on Movement

4. The restrictions on movement at the TDF are more consistent with a high-security correctional facility than a minimum or medium-security prison. Many of the practices pertaining to restrictions on movement and other restrictive practices were imported wholesale from practices established through the Department of Corrections, without full consideration of the appropriateness of all such practices in light of the patient population at the TDF. With the exception of those patients on advanced (AGE) status, patients' room doors are routinely locked throughout the day and night, and patient must request entry and exit to their room. When outside of their rooms, most patients are routinely escorted by

security personnel, and must pass through numerous locked doors before reaching the secure yard.

***3** 5. A Minnesota sex offender program operating under a comparable statutory scheme for civilly detaining and treating violent sex offenders provided a significantly less-restrictive environment than the TDF, but did not have significantly greater assaultive behavior from its patients. For instance, patients in the Minnesota program had keys to their rooms and could move around the facility with greater freedom than those at the TDF. However, as Dr. Schlank testified, the Minnesota program found that its level of freedoms and privileges created an unintended counter-therapeutic effect and treatment disincentives because patients began to prefer a continued stay at the facility, as opposed to working diligently in treatment to secure release.

6. Although the large majority of TDF patients are not assaultive toward staff or other patients, Defendants presented unrebutted evidence of numerous assaults on staff and between patients that warrant certain heightened restrictions on movement. In addition, Defendants showed that there are also legitimate concerns pertaining to the security of personal property within rooms that relate to rooms being locked, at least with respect to the locking of rooms after a patient has exited the room. Thus, the preponderance of the evidence shows that although the overall restrictions on movement at the TDF may be greater than those absolutely necessary in light of the patient population at the TDF, there are nonetheless legitimate operational and security concerns behind many of these restrictions.

Room and Personal Searches

7. Patients' rooms are routinely searched for contraband. Although this feature is more akin to a prison environment, as opposed to a forensic mental hospital or other treatment facility, Defendants presented evidence that numerous items, including a makeshift knife ("shank") and devices to conceal contraband, have been uncovered as a result of these searches. Thus, there are legitimate institutional security concerns underlying the room searches.

8. The TDF's prior policy was to strip search every patient before and after every visit, including visits with attorneys. Under current policy, strip searches have been replaced with a scanning device (the "Rapiscan") that does not require the patient to unclothe. There was credible testimony that the TDF intended to use the Rapiscan (or a similar device) as a permanent replacement for automatic strip searches. The device cost more than $115,000 and is under a one-year maintenance program. Defendants testified that they will extend the maintenance contract for four years. In addition, there was credible testimony that the TDF staff disliked performing the strip searches. If the Rapiscan device fails mechanically, however, Defendants will revert to routine strip searches until the device is fixed.

9. Taken together, the Court finds by a preponderance of the evidence that the TDF intends to use the Rapiscan as a permanent replacement for automatic strip searches on all patients.

Use of the "Black Box"

***4** 10. The Black Box is a security instrument that covers the linking chain and keyhole on handcuffs, and is intended to make it more difficult for a person to remove handcuffs. The TDF began using the Black Box after a successful escape by two patients during transport to court. Under prior policy, the TDF used the Black Box on all patients that were being transported off-site. Under current policy, the TDF will now use individualized risk assessments to determine the necessity of the black box.

11. The Court finds that there are legitimate security concerns underlying the past and present use of the Black Box.

Use of Special Management Status ("SMS")

12. Special or Secure Management Status ("SMS") refers to the status and set of conditions that a patient may be placed under when he is determined to be a danger to himself or others. The most common reason a patient is placed on SMS is assaultive or threatening words or behaviors aimed toward another patient or staff.

13. On or about September 2004, the TDF amended its long-standing policy pertaining to the SMS. The following findings of fact, unless otherwise noted, pertain to the terms stated in the new policy.

14. The initial determination of whether a patient is to be placed provisionally on SMS is made by a Security Therapy Aide (the "STA"), who is considered security, not treatment, personnel. STAs typically are not trained in the diagnosis or treatment of mental disorders. After a STA makes the initial SMS decision, the patient is directed to his room, and confined within (*i.e.,* the door to his personal room is locked). The patient is not restrained within his room (*i.e.,* five-point restraints or other devices are not used to restrain the patient). If the patient is not showing suicidal ideation or self-injurious behavior, he typically retains the right to use all personal items in his room, including, if available, the television, music players, and books.

15. The vast majority of patients placed on SMS comply with orders to go to their room and no staff physical intervention is typically required to place the patient in his room.

16. The administrator on duty reviews the STA's decision and has the authority to override the STA's decision. Once the patient is on SMS, the Clinician on Call is notified to perform an initial face-to-face medical and psychiatric assessment, or, if after hours, direct a registered nurse to conduct the assessment.

17. Under the terms of the new policy, a nurse (or, if available, the Clinician on Call) performs a psychiatric screen for suicidal or psychotic symptoms within one hour of placement on SMS. Under current policy, individuals with suicidal ideation or engaging in self-injurious behavior may be placed on Emergency Mental Health Status ("EMHS"). A patient on EMHS will be continually observed by staff. When necessary, a behavioral assessment by a licensed mental health professional or registered nurse will occur within one hour of placement on EMHS. Reassessments shall occur during every shift thereafter. In all cases, the patient must have a face-to-face evaluation by a licensed clinician within 24 hours.

***5** 18. Instances of suicidal ideation or behavior are rare at the TDF, and have occurred at a historical rate of twice a year. No successful suicide attempts have occurred. Dr. Jumper testified that in the past five-and-a-half years, a nurse performing an initial SMS evaluation has never identified an acute psychiatric need. Plaintiffs did not demonstrate otherwise.

19. If the nurse does not initially identify suicidal or psychotic symptoms, the patient is assessed by a nurse every 12 hours thereafter. The new policy specifies that the mental health assessments must be documented in the clinical charge and administrator-on-duty log during the shift time period.

20. Within two working days after initial placement on SMS, the Behavior Review Committee ("BRC") reviews the SMS determination. During this review process, the patient is afforded an opportunity to present his argument against the SMS decision. Following the BRC meeting, approximately one-third of the patients are released from SMS.

21. The experts in the present litigation agreed that the patients at the TDF differ in terms of typical diagnostic criteria and symptom profile from those patients typically residing at psychiatric hospitals. Specifically, under the Fourth Edition of the Diagnostic and Statistical Manual for Mental Dis-

orders ("DSM IV") classification system, the predominant Axis I diagnoses for TDF patients falls under the category of paraphilias and sexual disorders. The most common diagnosis is pedophilia; greater than 50% of the patients at the TDF have this diagnosis. Pedophilia is a mental disorder characterized by, among other things, intense sexual urges and behaviors toward prepubescent children. In contrast, the primary diagnoses for patients in forensic psychiatric hospitals fall under the mood or psychotic disorders categories, with schizophrenia, schizoaffective, bipolar I, and severe major depression being among the most common diagnoses.

22. Thus, in a psychiatric hospital population, a significant percentage of patients suffer from severe mental disorders that can interfere with everyday perceptions of reality, including delusions and hallucinations (*e.g.,*schizophrenia), or cause serious suicidal ideation and behaviors (*e.g.,*major depression and bipolar disorder). Many of the patients in psychiatric hospitals have difficulty with daily living tasks and self-care skills, and have serious interpersonal, behavioral, and cognitive deficits.

23. In contrast, the vast majority of patients at the TDF do not suffer from psychotic or severe mood disorder symptoms. Suicidal ideation or behavior is a very rare occurrence. The patients at the TDF can-and do-perform living and self-care tasks. Although paraphilias and sexual disorders are associated with significant cognitive distortions regarding purported sexual cues from victims, rationalizations of violent behavior, and compulsive and obsessive tendencies, these distortions do not result in the type of widespread impairments in reality testing, as well as other behavioral and cognitive deficits, typically seen in psychotic and serious mood disorders.

***6** 24. There is significant disagreement in the psychiatric and psychological community on whether, given the diagnostic and symptomatic profile differences noted above, the seclusion and restraint standards promulgated by the American Psychiatric Association in Task Force Report No. 22 (the "APA Standards") should apply to patients at the TDF. The APA Standards provide specific recommendations on the proper use of seclusion and restraint with individuals suffering from mental disorders. Specifically, the APA Standards require, among other things, an initial written seclusion order, which is time-limited and subject to ongoing review, and a face-to-face clinical evaluation within the first three hours of seclusion. Thereafter, a patient in seclusion must be monitored every twelve hours. Once the patient is determined to be no longer a threat to himself or others, he should be released from seclusion and/or restraint.

25. The APA standards were based, in part, on concerns over the widespread improper and inconsistent use of seclusion and restraints with patients with serious mental disorders. Historically, treatment staff at psychiatric hospitals tended to use seclusion and/or restraint as a method of punishment or for convenience of the staff to avoid managing difficult patients. Because in psychiatric hospitals violent or disruptive behavior is often the product of a serious mental disorder, the APA Standards provide that seclusion and restraint must be used only for therapeutic purposes, and not punishment. In addition, particularly for individuals with serious cognitive distortions or delusions, the experience of being locked and isolated in a foreign room and/or pinned down in five-point restraints can be extremely traumatic and counter-therapeutic. Thus, in the mental health treatment community, seclusion and/or restraint are considered last-resort alternatives.

26. Although the experts agreed on the diagnostic differences between the TDF patients and traditional psychiatric patients, they did not agree on the implications of these differences to the application of the APA Standards. Drs. Berlin and Metzner, experts for the Plaintiffs, testified that the APA Standards apply to the TDF's operations. In their view, the APA Standards apply equally to patients in psychiatric hospitals and facilities like the

TDF, where decisions are primarily based on dangerousness to self or others. Under Dr. Berlin's view, the central inquiry-and one that requires a trained mental health professional-is whether the assaultive or threatening behavior is a product of a mental illness. Thus, diagnostic differences between patient populations are irrelevant to the inquiry of whether a patient's dangerousness to self or others is caused by a mental disorder, and indeed the APA Standards do not differentiate procedures based on diagnosis.

27. In contrast, Drs. Dvoskin and Tardiff, experts for the Defendants, testified that the APA Standards do not apply to the TDF because of the significant differences in the types of patients there, as compared to psychiatric hospitals. Under their views, the potential that assaultive or self-injurious behavior is a product of an underlying mental disorder is significantly attenuated in a treatment setting like the TDF, where essentially none of the patients meet criteria for psychotic disorders or severe mood disorders. Under this view, the violent behavior that occurs at the TDF is primarily targeted antisocial behavior aimed at disrupting the rules and order of the TDF, as opposed to uncontrollable behavior caused by a mental disorder. Thus, the concerns and policies underlying the APA Standards pertaining to the mistreatment and neglect of the chronically mentally ill simply do not apply in a treatment setting like the TDF.

*7 28. The Court finds by a preponderance of the evidence that the patients detained at the TDF are substantially different in diagnosis and symptom profile from those typically found at forensic psychiatric hospitals (and other similar settings). Patients at the TDF do not routinely suffer from psychotic or severe mood disorders. Although comorbid major depression is common at the TDF, the absolute rarity of suicidal ideation or behavior, or significant impairment in self-care skills, indicates that the depression (or dysthymia) present is of a lesser severity than that routinely found in psychiatric hospitals. Although patients at the TDF have impaired volitional control regarding sexual urges, they do not have disorders that typically manifest in uncontrollable violent outbursts toward staff or fellow patients, or present serious suicidal risk. Indeed, the evidence showed that the vast majority of TDF patients placed on SMS complied with orders to return to their room without security personnel intervention, and restraints are rarely, if ever, used.

29. Thus, the vast majority of assaultive behavior that precipitates placement on SMS is unlikely to be the product of an Axis I major mental illness. Accordingly, the concerns that future assaultive behavior may be the product of a mental disorder are severely attenuated at the TDF, in comparison to a traditional psychiatric hospital or other inpatient mental health treatment facility.

30. The Court finds that the TDF has made good faith efforts, albeit under the specter of litigation and impending trial, to improve the policy and practices relating to SMS. Following the advice of Dr. Tardiff and others, the TDF has created a written policy that requires immediate administrative review of an STA's preliminary decision to implement SMS. The current policy also properly requires a psychiatric and medical screen by a trained nurse or clinician within one hour of placement in SMS. In addition, on-call psychiatric consultation is available if acute mental health needs are present. Because the new SMS policy was recently drafted and is in the process of implementation, there is limited evidence of the effectiveness of the policy in practice at the TDF.

31. The TDF's prior SMS procedures and practices lacked clear guidelines and requirements for prompt assessment of psychiatric needs by a nurse or any mental health professional. Nurses often did not properly document when (or if) they conducted the psychiatric screen, and it is likely that patients in SMS often did not receive an appropriate evaluation within a one-hour time frame (or perhaps at all).

32. The Court finds by a preponderance of the

evidence that there are legitimate safety and security purposes underlying the use of SMS, as it is presently formulated and implemented at the TDF. There are documented instances of assaults by patients on other patients and staff. SMS allows a patient to be removed from potentially harmful situations where he may injure himself, staff or other patients.

Use of Close Management Status ("CMS")

***8** 33. Following Secure Management Status, some patients may be placed on Close Management Status ("CMS"). CMS requires patients to wear yellow jumpsuits, and also has certain restrictions on movement and times for exercise or recreation.

34. Under the prior policy, patients were uniformly placed on CMS for thirty days and were required to wear yellow jumpsuits. Under current policy, TDF officials will make individualized decisions pertaining to which patients wear a yellow jumpsuit.

35. The Court finds that there are legitimate institutional security concerns underlying the use of the yellow jumpsuit and other features of CMS. For instance, the yellow jumpsuit allows staff and security personnel at the TDF to identify quickly those patients at greatest risk for assaultive behavior, and facilitates the imposition of appropriate restrictions on movement. The Court also finds that the use of yellow jumpsuit does not carry such a stigmatizing effect that it impedes the effective delivery of treatment or creates a significant countertherapeutic environment.

Other Restrictions

36. Patients at the TDF generally have a wide range of available commissary items, although the availability of certain items may depend upon the patients' behavioral management status. There was no evidence demonstrating that the restrictions on commissary items are excessive.

37. The use of intercoms within a patient's room facilitates institutional security. There was no evidence demonstrating that the use of such intercoms is a significant imposition on the patients' privacy.

38. The use of a variety of statuses within the TDF that correspond with privileges, including room location, increased freedom of movement, and access to certain commissary items, is not atypical of institutional and quasi-correctional settings. There are rational security concerns underlying the decision to have all patients initially begin at a lower end of the privilege continuum: in many instances, the staff do not initially know the potential risks of a new patient. In addition, making privileges contingent on good behavior and participation in treatment, creates positive contingencies and reinforcements for productive therapeutic behavior.

B. Claims Pertaining to Treatment, Informed Consent, Access to Treatment and Confidentiality

39. The Consent-to-Treatment form used by the TDF prior September 2004 had an apparent typographical error in the following sentence that omitted the word "each": "I understand that, when necessary, the treatment team and program-related staff may share information with [each] other about me without my consent."The current consent form does not have this typographical error. Although the TDF apparently used a consent form with a blatant and significant typographical error for several years, there was no evidence showing that the treatment staff had relied on this error to share confidential information with others outside of treatment staff.

***9** 40. The Consent-to-Treatment form contains a provision notifying patients that treatment records may be provided to the Illinois Attorney General "in order to prepare for court."Under prior policy, TDF staff automatically sent copies of any records requested by a patient to the office of the Illinois Attorney General, without requiring a request from

the Attorney General's office or making an individualized assessment of whether the patient was requesting the records in preparation of a court filing. The TDF has since discontinued this policy. Plaintiffs did not show, however, that the Attorney General used any patient information supplied by the TDF for purposes other than preparing for court proceedings.

41. Until recently, the Consent-to-Treatment form included a statement pertaining to Illinois' mandatory reporting law that stated: "any uncharged offense(s) against minors will be reported to DCFS." Although the TDF apparently used this form, which contained an inaccurate statement of the Illinois mandatory reporting law, for several years, the current consent form does not have this particular statement.

42. Until recently, the Consent-to-Treatment form did not contain specific information pertaining to arousal-reducing medications. The current form contains information pertaining to such medications.

43. Patients must sign the Consent-to-Treatment form to receive treatment at the TDF, as the TDF must respect a patient's right to refuse treatment. There are no provisions in the consent form that allow the patient to sign the form, accept treatment, but yet specifically preserve (or claim to not waive) the right to object in a court of law to certain disclosures or other matters presented in the Consent-to-Treatment form.

44. The TDF's treatment program requires patients to disclose in great detail past offenses, including uncharged offenses. There are no immunity provisions insulating the patients from future prosecution based on the disclosure of uncharged offense. The clinical practice at the TDF, however, is to advise patients not to disclose identifying information that would trigger mandatory reporting requirements. There have been three instances where the Illinois DCFS was notified under the mandatory reporting statute. Yet, to-date, no TDF patient has been prosecuted for disclosures within the treatment program.

45. The TDF uses a Psychosexual Testing Consent Form for the administration of the Multiphasic Sex Inventory that contains a hold-harmless and indemnity clause. The test may not be administered nor scored without a properly signed consent form. The consent form was drafted by the test developers, not the TDF staff. No patient has been denied treatment because of refusal to sign the consent form, nor is the test a prerequisite for participation in the treatment program.

46. Occasionally, some of the meetings between mental health staff and patients occur in the patients' rooms or in the common area directly outside of the patients' rooms. These common areas do not have adequate sound privacy to ensure patient confidentiality.

Arousal Reconditioning and Medications

***10** 47. The successful treatment of sex offenders like those treated at the TDF is complicated and may require multi-modal treatment techniques, including cognitive, behavioral, and medical interventions. The Practice Standards and Guidelines for the Members of the Association for the Treatment of Sexual Abusers (the "ATSA") consider arousal reconditioning, relapse prevention (cognitive-behavioral techniques), and medication techniques to be viable treatment interventions for sexual abusers.

48. There is professional disagreement in the psychiatric and psychological treatment fields as to the long-term effectiveness of sexual arousal reconditioning, as practiced at the TDF, in the treatment of sexual abusers. Although clinicians treating sexual offenders continue to use arousal reconditioning as a treatment tool, there is significant research literature indicating that the effects of arousal reconditioning are short-term and may not significantly reduce recidivism rates. The arousal recon-

ditioning technique, however, may have short-term utility in providing an immediate assessment of a patient's current deviant arousal.

49. Plaintiffs' expert, Dr. Berlin, a recognized expert in the field of treatment for sexual abusers, provided credible testimony showing that arousal reconditioning is typically not sufficient treatment on its own, and may indeed provide very limited value, even when used in conjunction with medications and other cognitive therapy techniques. Dr. Berlin, however, conceded that there are significant numbers of clinicians who continue to believe that arousal reconditioning is an effective cognitive therapy technique for treating sexual offenders. Indeed, the ATSA, a respected professional organization that provides recommended guidelines and standards for sex offender treatment providers, specifically encourages the use of arousal reconditioning techniques.

50. Dr. Schlank, Defendants' expert, credibly testified that techniques such as arousal reconditioning are routinely used in sexual offender treatment programs. She also testified that it is not unusual for such programs to emphasize cognitive techniques at the outset of treatment, and thereafter direct attention toward medications.

51. Dr. Berlin provided credible testimony showing that anti-androgen medications can be an important treatment tool for sexual offenders. Selective Serontinergic Reuptake Inhibitors ("SSRIs") may also have some utility in the treatment of sexual offenders, although their effectiveness on reducing deviant sexual arousal is likely to be less than anti-androgen medication. There is, however, a danger that patients may over-rely on medications as a purported "cure" and will underutilize cognitive therapy and relapse prevention techniques. Thus, over-reliance on medications may place put patients at heightened risk of a relapse under certain circumstances.

52. Under the prior policy, the TDF treatment staff may have overestimated the utility of arousal reconditioning, and underestimated the utility of anti-androgen medications.

***11** 53. The TDF has psychiatric coverage on two days per week, for a total of 16 hours per week. Although the TDF staff concedes that this level of coverage is sub-optimal, particularly as the new treatment policies may substantially increase the use of arousal-reducing medications, it is nonetheless sufficient to cover the core psychiatric needs of the TDF patients.

Use of the Polygraph

54. The TDF administers the polygraph test as part of its treatment program. The TDF uses a polygraph technique called the Control Question Technique (the "CQT"). The polygraph is used to assess, among other things, the truthfulness of patients' disclosures about past offenses.

55. There is significant professional disagreement about the reliability and validity of the CQT administration, as well as the proper role of the polygraph in the treatment of sex offenders in general. There is substantial research literature indicating that the CQT is unreliable and overestimates untruthful responses. Dr. Iacono, Plaintiffs' expert on the polygraph, however, conceded that there are recognized experts in the scientific community, although they tend to train at one particular research institution, who believe the CQT is a scientifically valid procedure for the polygraph. In addition, many departments of the federal government, including the FBI, routinely use the CQT.

56. Independent of the reliability or validity of the polygraph instrument as a purported "lie detector," it can be an effective treatment tool because it can facilitate patient disclosures regarding past offenses. That is, simply administering a polygraph test may encourage certain patients to make truthful disclosures before or after the test.

57. Patients who fail the polygraph examination generally cannot advance beyond Phase II in

the treatment program. There was evidence, however, that patients who failed the polygraph (or have inconclusive results) can complete other work in advanced phases of the program, and even can obtain release. Thus, a failed polygraph examination is not an insurmountable obstacle to release from the TDF.

58. Under prior policy, the TDF Polygraph Review Committee reviewed only a subset of polygraph results and may have overestimated the utility of the polygraph in detecting untruthful responses. Under current policy, the Polygraph Review Committee will review all polygraph test results.

Progress of Treatment and Prospects of Release

59. The TDF core treatment program comprises five phases, each with different treatment tasks and goals. Phase 1 (Assessment) involves initial treatment evaluation and baseline measurements. Phase 2 (Accepting Responsibility) includes use of the polygraph, extensive written descriptions ("journaling") of past offenses, and cognitive restructuring techniques aimed at correcting distortions that relate to sex offending. Phase 3 (Self-Application) includes relapse prevention techniques, which involve detailed assessments of the situational, behavioral and cognitive variables associated with offending, as well as continued cognitive restructuring and journaling work. Phase 4 (Incorporation) incorporates the prior three phases and helps the patient formulate a "wellness" plan. Finally, Phase 5 (Transition) plans the patient's reintroduction into the community.

***12** 60. The TDF core treatment program provides approximately 15 hours of direct sex offender treatment per week. According to Dr. Schlank's unrebutted testimony, this amount of treatment is somewhat higher than other similar treatment programs. In addition to the 15 hours of treatment, there are other ancillary treatment programs provided.

61. In general, the treatment program provides coherent treatment goals and provides an overall roadmap for progress.

62. Participation in treatment at the TDF. however, is quite low. Less than 50% of patients participate in core treatment. There are a variety of reasons why patients do not participate in treatment. Some patients do not participate because they disagree with the treatment methods, consent forms, and/or disclosures to the Attorney General. Others do not participate because they may have been advised by their attorneys not to participate in treatment pending resolution of this case and/or other court appeals.

63. Certain members of the TDF staff recognize that participation in treatment is excessively low and have engaged in efforts to increase outreach to patients. The recent policy changes, including review of polygraphs, more-carefully delineated SMS procedures, clarification of the confidentiality provisions, increased use of anti-androgen medications, more individualized assessments of threat risks, elimination of strip searches, as well as resolution of this litigation, should provide incentives for increased participation in treatment.

64. Given the chronic and severe nature of the paraphilias and sexual disorders suffered by patients at the TDF, the course of treatment to date is not inappropriately long. The treatment program appropriately focuses on behavioral changes as the sign post for release, rather than fixed time periods. Moreover, completion of all phases of treatment is not an absolute prerequisite for release from the TDF: some patients have been released without completing all phases of treatment.

65. There is significant treatment value in having patients provide some form of written description of past offenses (the so-called "journaling" technique). Under prior policy, however, the journaling process in Phase II was overemphasized and excessively time-consuming in relation to other aspects of the treatment program. Under current

policy, the process of journaling is more streamlined, having moved to a "categorical offense" description model. This should facilitate greater patient success in Phase II of the treatment program.

66. Since the program's inception more than five years ago, approximately 10 patients have been released. The large majority of these patients, however, had not completed all phases of the treatment program. In addition, several of the patients were released by court order, against the recommendation of the independent consultant hired by TDF to make release recommendations. The rate of release, although notably low, is not unusual, given the complexity of psychological issues facing TDF patients, coupled with the low participation rates in treatment.

Accreditation

***13** 67. The TDF is not accredited by the Joint Commission of Accreditation of Healthcare Organizations (the "JCAHO") or the Commission on Accreditation of Rehabilitation Facilities (the "CARF"). In June 2003, the TDF performed a "mock" CARF review and determined that it had not formalized its policies sufficiently in writing to pass CARF accreditation. CARF accreditation is generally considered to have less stringent requirements than JCAHO.

Other Issues Raised in the Complaint

68. *Staff training.*The TDF treatment staff is sufficiently trained and informed in the treatment of sexual deviance. The TDF treatment staff has the proper credentials for the tasks performed.

69. *Individualized treatment plans.*The treatment plan for the patients is sufficiently individualized to meet patient needs, and, as noted above, the treatment program provides a coherent road map and goals for treatment progress.

70. *Family participation in treatment.*There was no evidence demonstrating that family members are unreasonably excluded from participating in treatment or visiting.

71. *Grievance procedures.*The TDF has established sufficient grievance procedures. For instance, the evidence showed that the Behavioral Review Committee conducts hearings to address patients' grievances regarding SMS. In addition, there was evidence showing that patient committees are involved in providing feedback to treatment and administrative staff, and reasonable accommodations have been made.

72. *Education, Religious, Vocational, and Recreational Activities.*There was no evidence demonstrating that the TDF fails to afford reasonable educational, religious, vocational or recreational activities.

III. *CONCLUSIONS OF LAW*

A. Standard of Review for Constitutional Claims

1. Plaintiffs' constitutional challenges to the conditions of confinement and treatment fall broadly under the "professional judgment standard." *Youngberg v. Romeo,* 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Under this standard, decisions made by trained professionals are entitled to a presumption of correctness. *See id.* at 324.Constitutional violations will be found only when administrative or clinical decisions pertaining to confinement and treatment are a "substantial departure from accepted professional judgment, practice or standards."*Id.* at 323.In addition, courts may not "specify which of several professionally accepted choices should be made," but rather only "make certain that professional judgment in fact was exercised."*Id.* at 321.Thus, this Court's review of the TDF's practices is very limited: it can intervene only if Plaintiffs have established that TDF's practices are "such a *substantial* departure from accepted professional judgment, practice, or standards as

to demonstrate that the person responsible did not base the decision on such a judgment."*Id.* at 323 (emphasis added).

2. Persons who have been involuntarily committed are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."*Youngberg,* 457 U.S. at 321-22. The Constitution, however, does not require that the patients at the TDF receive "optimal treatment," but rather minimum levels of care are sufficient. *West v. Schwebke,* 333 F.3d 745, 749 (7th Cir.2003); *see also Collignon v. Milwaukee County,* 163 F.3d 982, 988 (7th Cir.1998)."[A]ll the Constitution requires is that punishment be avoided and medical judgment exercised."*West,* 333 F.3d at 749.

***14** 3. The SVP Act contains a provision that specifically exempts the TDF from complying with the Mental Health and Developmental Disabilities Code (the "MHDDC" and the "MHDDC exemption").725 ILCS 207/50(b) (West 2004). The MHDDC provides a series of rights and procedural requirements for mentally ill individuals, including significant limitations on the use of seclusion and restraint. *See*405 ILCS 5/2-108 and 405 ILCS 5/2-109. Defendants argued repeatedly at trial (and in their post-trial brief) that the MHDDC exemption is an affirmative defense that precludes Plaintiffs from challenging any practices that are required under the MHDDC. In particular, Defendants argue that the MHDDC exemption precludes the TDF from being required to comply with the APA Standards on seclusion and restraint. *See, e.g.,* Def. Post Trial Br. at 20-21.

4. Defendants' line of reasoning here is not particularly well-developed, but they appear to argue that because the APA Standards are functionally equivalent to the MHDDC provisions on seclusion and restraint, Plaintiffs' argument runs headlong into the MHDDC exemption. *See id.* 20-21.In addition, Defendants seem to argue that because Plaintiffs have not mounted a facial challenge to the MHDDC exemption, they must be precluded from allowing a *de facto* invalidation of this statutory provision via application of the APA Standards. *See id.* at 6-7, n. 9.

5. Defendants' argument on the MHDDC exemption is unconvincing. First, Defendants provide no authority for the proposition that a party challenging practices at a state-operated facility must also raise a facial challenge to any underlying statutory authority related to such practices. Nothing in *Youngberg* or its progeny suggests that such a facial challenge is a procedural prerequisite. Second, and relatedly, Defendants misunderstand the legal implications of a Plaintiff victory on this issue. Specifically, a finding that the APA Standards apply under *Youngberg* is not tantamount to the distinct finding that the MHDDC exemption is constitutionally invalid. Procedurally, the issue of the constitutionality of the MHDDC exemption is not before this Court. It may be that *Youngberg* requires the TDF to follow certain seclusion and restraint practices that happen to overlap with provisions in the MHDDC, but it is incorrect to consider that equivalent to a legal finding that the MHDDC provision is unconstitutional. Indeed, there are numerous provisions in the MHDDC that would remain untouched by a finding that the APA Standards apply, and, moreover, nothing in the MHDDC exemption forbids the TDF from complying with the APA Standards. Rather, properly read, the plain language of the MHDDC exemption merely suggests that the MHDDC itself cannot provide a toehold for legal liability-and Plaintiffs indeed are not relying on the MHDDC provisions. Finally, Defendants ignore (or misunderstand) the fundamental concept that states cannot create statutory schemes that evade the requirements of the United States Constitution. That is, nothing in the SVP Act itself can serve as an affirmative defense that protects the TDF from comporting with the constitutional requirements specified in *Youngberg.*

Standard on Review Regarding Mootness of Claims

***15** 6. As noted above, Defendants altered

many of the challenged policies, including several at the last minute, on the eve of trial. As a result of these changes, Defendants now claim that many of the Plaintiffs' claims are effectively mooted. Plaintiffs respond that many-if not all-of the policy changes are merely "adjustments of convenience" for the purposes of prevailing in the litigation, rather than bona fide and long-term shifts in policy and practice.

7. To prevail on their claim of mootness, Defendants face a heavy burden: they must show that subsequent events have "made it absolutely clear that the allegedly wrong behavior could not reasonably be expected to recur."*See, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Defendants must show that "there is no reasonable expectation that the wrong will be repeated."*Id.* (citation omitted).

8. The Court finds that Plaintiffs' claims pertaining to the strip searches and the Consent-to-Treat form are mooted by Defendants' policy changes because Defendants have shown that there is no reasonable expectation that they will systematically return to former procedures. For instance, the TDF expended considerable funds on the Rapiscan device and has in place a reasonable maintenance plan to ensure its continued operation. Although it is possible that the device may break down and require a temporary return to strip searches, this outcome is too speculative (and infrequent) to amount to a cognizable claim. The Consent-to-Treat form omitted or changed the objectionable language, and added language pertaining to medications-these are essentially the changes requested by Plaintiffs-and there was no indication at trial that the Defendants intended to return to the old consent forms.

9. Plaintiffs' other claims are not mooted by the recent policy changes. The vast majority of these changes occurred on the eve (or even during) trial and thus have yet to become established practice. For instance, Defendants themselves acknowledged that the intended changes to the polygraph, SMS, and CMS procedures were not yet fully implemented. As noted above, the Court finds that Defendants have made good faith efforts to improve the program in various ways and intend to convert these new policies into established practice. This good faith finding alone, however, is insufficient to meet the heavy burden of showing that there is no reasonable expectation that past policies will be repeated, particularly as Defendants have maintained throughout this litigation that their past policies were entirely adequate. In addition, Plaintiffs maintain that even the new procedures are, for the most part, constitutionally inadequate. Thus, the Court will reach conclusions of law based on both the old and the new procedures in these areas.

The Conditions of Confinement

10. Facility administrators are afforded wide latitude to maintain institutional security, internal order, and ensure the protection of patients and staff. *See Youngberg,* 457 U.S. at 322-23;*West,* 333 F.3d at 748. Professional decisions made by appropriately trained personnel are entitled to a presumption of correctness. *See Youngberg,* 457 U.S. at 324. Measures employed by institutions to ensure security and order are permissible non-punitive interventions. *See id* at 322-24.

***16** 11. Here, there is an established history of patients acting in threatening and assaultive ways toward the staff and other patients at the TDF. Contraband items that could be used as weapons have been found. In addition, the criteria for being detained at the TDF include the commission of at least one sexually violent act, and previous violent acts are important predictors of future violence. *See Kansas v. Hendricks,* 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (citations omitted). Indeed, the large majority of patients at the TDF have repeatedly engaged in acts of sexual violence, some with adults. Most TDF patients, however, do not appear to be generally violent, but rather target specific victims, most often children. Thus, it can-

not be said that this is a population particularly prone to assaulting staff, and indeed the large majority of violent episodes involving patients and staff appear to be limited to a smaller cluster of patients.

12. Although the configuration of the facility and the level of restrictions may be excessive in light of this patient population, this Court has only limited discretion to review the TDF's administrative and security decisions. Defendants' decisions (with the exception of its prior policy on SMS, as discussed below) fall under the purview of reasonable professional judgment in the administration of a hybrid detention and treatment facility. Thus, whether under old or new policies, the restrictions of movement, the room and personal searches, use of the black box, use of close management status, and use of intercoms, are not substantial departures from accepted professional judgment and standards, and therefore are constitutionally permissible. Specifically, as noted above under the Findings of Fact, there are legitimate security and institutional concerns underlying these policies that indicate that professional judgment is being properly exercised.

13. The new policies pertaining to conditions of confinement, however, are clearly superior to old practices, and will likely facilitate increased patient participation in successful treatment, which is, after all, one of the main purposes of the SVP Act.

14. With regard to Defendants' procedures pertaining to the use of secured or special management status ("SMS"), the Court finds that the APA Standards (and other similar professional standards cited by the Plaintiffs) do not apply wholesale to the use of SMS. First, the concerns underlying the APA Standards, namely that the behavior in question is the product of a mental disorder, are significantly attenuated under the present circumstances because the patient population is significantly different from that found in psychiatric hospitals. *See In re Samuelson,* 189 Ill.2d 548, 244 Ill.Dec. 929, 727 N.E.2d 228, 237 (Ill.2000)(noting the differences between persons committed under the SVP Act versus te Illinois Mental Health Code); *see also In re Treatment and Care of Luckabaugh,* 351 S.C. 122, 568 S.E.2d 338, 346 (S.C.2002) (citations omitted) (noting how violent sex offenders are a different class of committable individuals). Second, the SMS procedures are significantly different from the typical use of seclusion and restraint in psychiatric hospitals. Patients at the TDF are not secluded in designated seclusion rooms, devoid of personal artifacts or other comforts, but rather are confined in their own rooms, with access to all their personal belongings. *Cf. West,* 333 F.3d at 747 (describing the different type of "therapeutic seclusion" used in the Wisconsin SVP program, where patients were placed in a room that contained only a concrete platform for a bed, and were often deprived of clothing and other personal items and amenities). In addition, patients are not physically restrained once inside their rooms.

***17** 15. Thus, the nature of the precipitating behavior and the actual implementation of SMS is substantially different from the types of behaviors and procedures addressed by the APA Standards. Accordingly, rigid adherence to the entire protocol specified by the APA standards is not constitutionally required. *See West,* 333 F.3d at 749 (noting that "the Constitution does not immediately fall into line behind the majority view of a committee appointed by the American Psychiatric Association" and "[i]n a world of uncertainty about how best to deal with sexually dangerous persons, there is room for both disagreement and trial-and-error."). Moreover, even if the APA Standards applied here, this is not a negligence case where any deviation from the standard of care could impose liability. *See Collignon v. Milwaukee County,* 163 F.3d 982, 988 (7th Cir.1998)(contrasting the professional judgment standard with negligence and intentional misconduct standards). Instead, the controlling standard in a constitutional challenge requires a substantial departure from accepted practices or standards. *See Youngberg,* 457 U.S. at 323. As shown directly below, the TDF's procedures are not such a substantial departure from the protocol under

the APA Standards.

16. Although the APA Standards do not control the determination of what constitutes professional judgment in the context of the TDF's use of SMS, they nevertheless inform this determination. For instance, the APA Standards recommend that there be a timely and documented initial psychiatric and medical screen shortly after placement in seclusion. This recommendation appears to be universally endorsed by the psychiatric community. Indeed, there was a consensus among the testifying experts that professional judgment in this area requires, at a minium, a timely assessment of potential mental health needs. In fact, the TDF's own expert, Dr. Tardiff, specifically recommended and guided the change in policy that now clearly requires a documented psychiatric screen within one hour of placement in SMS.

17. Given the differences in patient populations and the procedures at the TDF, staff may exercise its professional judgment in applying and modifying pertinent portions of the APA Standards (and other professional standards). For instance, the TDF's decisions to allow security personnel make the preliminary determination of SMS, to have a nurse make the initial psychiatric screen, and to amend the time period for subsequent observations all reflect the exercise of professional judgment in light of the patient population at the TDF. In fact, the competing testimony provided by recognized experts in this case pertaining to the TDF's SMS procedures show that there is, at most, bona fide professional disagreement about whether, and in what fashion, the APA Standards map onto the SMS procedures at the TDF. Indeed, Defendants' key expert, Dr. Tardiff, was the chairperson on the APA Standards task force, and yet testified that they did not apply in this treatment setting. (Plaintiffs note that Dr. Tardiff's testimony may not have been the model of consistency, considering his prior testimony in a Wisconsin case, but the Court notes that the seclusion practices at the Wisconsin facility were indeed different, *see West,* 333 F.3d at 747, and that Dr. Tardiff's observation regarding patient differences was effectively supported by Plaintiffs' own experts.)

***18** 18. The TDF's prior policy did not clearly require a timely psychiatric and medical assessment. Even though the concerns regarding suicidality and other products of mental disorder are attenuated in this population, they are certainly not entirely absent. Professional judgment dictates that patients placed in seclusion (or, under the circumstances here, quasi-seclusion is a more-appropriate term) must receive, at a minium, an initial psychiatric screen, which must be well documented for other treatment staff. Thus, the TDF's prior policy did not meet constitutional requirements on these grounds.

19. Although the Court finds that the new SMS policies are not sufficiently established to meet the high burden of mooting Plaintiffs' claims, it finds that Defendants have made a sufficient showing that the new policy is in fact being implemented at the TDF. Thus, there is no need for the imposition of the extraordinary remedy of injunctive relief, in light of Defendants' current policies and practices. Although Plaintiffs argue that the last-minute policy changes are merely temporary litigation strategy, and, moreover, the staff at the TDF lacks the ability to implement the new SMS policies effectively, the Court finds that this litigation has caused a good faith reexamination and change in the insufficient past SMS policy. Moreover, the Court finds that Defendants presented credible testimony of their intention to adhere to the recent policies presented at trial.

The Claims of Inadequate Treatment

20. As noted above, the Constitution does not require optimal treatment. *See Youngberg,* 457 U.S. at 319;*West,* 333 F.3d at 749. All that is required is minimally adequate treatment to protect a patient's liberty interests. *See Youngberg,* at 319.The TDF's treatment practices can be found unconstitutional

only if the practices are such "a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."*Youngberg,* 457 U.S. at 323.

21. In a previous opinion in this case, this Court relied on the *Youngberg* standard, but also cited Third and Eleventh Circuit authority for the proposition that an involuntarily civilly committed person is entitled to treatment that provides "a meaningful chance to improve and win his eventual release."*Hargett v. Baker,* 2002 WL 1732911, *2-3. At that early stage in the litigation, it was possible that the treatment claims articulated by Plaintiffs fell within the gap that the Supreme Court in *Youngberg* declined to address: specifically, whether an involuntarily committed person has "some general constitutional right to treatment *per se,* even when no type or amount of training would lead to freedom."*Youngberg,* 457 U.S. at 318;*see also D.W. v. Rogers,* 113 F.3d 1214, 1218, n. 5 (11th Cir.1997). At this stage, however, it is clear that the "minimal treatment" standard articulated in *Youngberg* is the proper controlling standard. In addition, the Supreme Court has noted that the Constitution does not "prevent[ ] a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others."*Kansas v. Hendricks,* 521 U.S. 346, 366, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Moreover, even if a "meaningful chance to improve" were part of the standard here, it is clear that the TDF treatment program does provide such "meaningful chance."

***19** 22. The types of chronic sex offenders who reside at the TDF are notoriously difficult to treat. They suffer from extreme and difficult-to-control sexual urges, which may have complicated biological, behavioral and cognitive causal factors. Many suffer from a variety of co-morbid problems that complicate the treatment picture, such as substance abuse, mood, and personality disorders. In addition, many patients at the TDF are reluctant to seek treatment and have an extensive history of re-offending. In short, this is a chronic, severely disturbed patient population with a multiplicity of serious and complex psychiatric difficulties. This is certainly not the typical outpatient "worried well" or depressed patient, who can be successfully treated with short-term cognitive-behavioral therapy and/or antidepressant medication.

23. Thus, the clinical staff at the TDF is faced with the unenviable competing tasks of providing adequate treatment at a pace to allow sufficient progress for potential release, while simultaneously ensuring that patients are not released prematurely into the community to reoffend. The latter task is not to be taken lightly, as the recidivism rates of sex offenders are tragically high. This, of course, is the principal rationale behind the SVP Act.

24. In light of these challenging tasks, the Court finds that the treatment program and delivery of services at the TDF adequately meet constitutional requirements. Specifically, the TDF's use of arousal reconditioning and polygraph techniques are well within the bounds of professional judgment. While arguably the TDF may have over emphasized these techniques in its treatment regimen, there is certainly widespread acceptance and use of these techniques in the sex offender treatment community. Thus, it cannot be said that the TDF's use of such techniques is a substantial departure from accepted practices and standards. *See Youngberg* 457 U.S. at 323.

25. Similarly, the TDF's use of arousal-reducing medications, while perhaps not optimal, is clearly within constitutional bounds. As noted above, there is reasonable professional disagreement as to the timing, dosage, and type of medications that are most effective in reducing deviant sexual arousal. Dr. Berlin, an undisputed expert in this area, represents one end of the professional continuum on the use of anti-androgen medications, but his testimony, coupled with that of Defendants' experts, fairly shows nothing more than bona fide professional disagreements, and these seldom, if ever, amount to constitutional violations, provided

there are sufficient numbers of respected professionals on each side. *Youngberg,* 457 U.S. at 322-23.

26. The low rates of treatment participation, progress, and release at the TDF are disappointing, but do not amount to constitutional violations. As noted under the factual findings, there are a multiplicity of reasons why patients do not participate in treatment, and only some of these can be laid on the doorstep of TDF policies and practices. The treatment program has a coherent overall plan and sequence, with identifiable goals and standards. This is not to say that the treatment program is ideal: particularly under past practices, certain treatment tasks were excessively time-consuming or ill-defined, such as the former "journaling" approach under Phase II.

***20** 27. The primary impediment, however, to achieving greater success in the program is the severity and chronicity of the patient population. Taken together, there was insufficient testimony demonstrating that the structure or administration of the treatment program was such a substantial departure from professional judgment that it amounts to constitutionally deficient treatment. *See Youngberg,* 457 U.S. at 322-23.

28. The confidentiality practices of the TDF, although, again, perhaps not optimal, do not amount to a constitutional violation. In particular, there was evidence that certain patient-therapist interactions occurred in the common areas near other patients' rooms. This lacks adequate sound privacy to maintain confidentiality, but such activities, although not desirable practice, are not such a substantial departure to trigger constitutional relief. The disclosures to the Illinois Attorney General under prior policy, although apparently excessive in light of the provisions for disclosure under the SVP Act, do not amount to a constitutional violation. For instance, there was credible testimony by Dr. Wood that he believed the disclosures were to be used by the Attorney General for preparing for court, and Plaintiffs did not present evidence to show otherwise. Moreover, this former practice has been discontinued.

29. The absence of accreditation by JCAHO or CARF does not amount to a constitutional violation. The facility clearly could benefit from further development and refinement of written policies, and accreditation by an appropriate organization may provide additional and valuable oversight. Accreditation by itself, however, is not a litmus test for the constitutionality of the practices at the TDF. Instead, the Court must look to the actual practices, and, as noted above, they pass constitutional muster for a variety of reasons.

30. Finally, the remaining claims raised by Plaintiffs in their complaint or at trial pertaining to staff training, family participation, grievance procedures, individual treatment plans, discharge planning, and educational and vocational training had thin-if any-evidentiary support at trial. Plaintiffs certainly did not establish that the TDF's practices in these areas amounted to constitutional violations.

IV. *CONCLUSION*

For the reasons stated herein, Plaintiffs' demand for Declaratory Relief is GRANTED insofar as the TDF's prior SMS was unconstitutional and Defendants failed to establish that Plaintiffs' claim on this issue was moot, but any remaining claims for declaratory relief are DENIED.

Because the TDF has made the requisite showing that the new SMS policy cures the defects in the prior policy, Plaintiffs' demand for injunctive relief is DENIED with respect to this and all other claims.

IT IS SO ORDERED.

N.D.Ill.,2005.
Hargett v. Adams
Not Reported in F.Supp.2d, 2005 WL 399300 (N.D.Ill.)

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Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 1474658 (D.S.C.)
(Cite as: Not Reported in F.Supp.2d)

Williams v. Gintoli
D.S.C.,2004.
Only the Westlaw citation is currently available.
United States District Court,D. South Carolina.
Danny G. WILLIAMS, DMH # 7800846, SCDC # 098808, Plaintiff,
v.
Mr. George P. GINTOLI, Director of South Carolina Department of Mental Health; Dr. W. Russell Hughes, Doctor and CEO of the SCDMH Behavioral Disorders Treatment Program (BDTP); Mrs. Brenda Young-Rice, Program Manager, BDTP; Elizabeth Hall, Division Director of Public Safety; Doug Cochran, JD, Director of Advocacy; and South Carolina Department of Mental Health, Defendants.
No. C/A9:03-1102-24BG.

March 9, 2004.

Danny G. Williams, Columbia, SC, Plaintiff Pro Se.
Vinton Devane Lide, Sheally Venus Poe, Vinton D. Lide and Associates, Lexington, SC, for Defendants.

ORDER

SEYMOUR, J.

Introduction

***1** Plaintiff Danny G. Williams is a person who has been involuntarily civilly committed to the South Carolina Department of Mental Health Behavior Disorders Program pursuant to the South Carolina Sexually Violent Predator Act, S.C.Code Ann. §§ 44-48-10 et seq. (the "SVP" Act).[FN1] Plaintiff filed this 42 U.S.C. § 1983 action *pro se*[FN2] and *in forma pauperis* on May 31, 2003, alleging numerous constitutional violations by Defendants.

FN1. A person involuntarily civilly committed, by definition, is not a prisoner and is not subject to the exhaustion requirements of 42 U . S.C. § 1997e(a) (1994 ed., Supp. V).

FN2. A pro se litigant's initial pleadings are to be accorded liberal construction and held to a less stringent standard than those drafted by attorneys. *Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980)(*per curiam*). As such, Plaintiff's pleadings have been liberally construed.

On May 29, 2003, Plaintiff filed an amended complaint reasserting his original allegations and seeking a declaration that the SVP Act is unconstitutional on its face. On August 13, 2003, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. On August 18, 2003, pursuant to *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir.1975), Plaintiff was notified of the dismissal procedures and the possible consequences if he failed to adequately respond. Plaintiff filed a return and opposition to Defendants' motion on August 19, 2003.

Pursuant to 28 U.S.C. § 636(b), this case was referred to United States Magistrate Judge George C. Kosko for a Report and Recommendation. On December 17, 2003, Magistrate Judge Kosko issued his Report and recommended that Defendants' motion be granted. On December 30, 2003, Plaintiff filed objections to the Magistrate Judge's Report.

Role of the Magistrate Judge

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. *Mathews v. Weber,* 423 U.S. 261, 270, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a *de novo* determination of any portions of the Report and Recommendation to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recom-

mendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

Analysis

As an initial matter, the court notes that the South Carolina Department of Mental Health is a state agency and therefore immune from suit under Eleventh Amendment Immunity. The Eleventh Amendment to the United States Constitution reads as follows:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has recognized that the ultimate guarantee of the Eleventh Amendment is that a non-consenting state may not be sued in federal court by private individuals. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Eleventh Amendment protection also extends to state agencies which act as an "arm of the state." *SeeCash v. Granville County Bd. of Education,* 242 F.3d 219 (4th Cir.2001). Therefore, the South Carolina Department of Mental Health is immune from suit in federal court.

***2** The individual Defendants are employees of the Department of Mental Health. The Plaintiff has brought this action against them in their individual and official capacities and seeks damages and injunctive relief. As to Plaintiff's claims for damages, official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent ."*Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (citing *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611. (1978)). "Suits against state officials in their official capacity therefore should be treated as suits against the State."*Id.* Therefore, Plaintiff's claims for damages against the individual Defendants in their official capacities are barred. However, the Defendants are liable for damages in their individual capacities. *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

With respect to Plaintiff's claims for injunctive relief, the Supreme Court has recognized that "the Eleventh Amendment does not bar suits seeking to enjoin state officials from committing continued violations of federal law."*Booth v. State of Maryland,* 112 F.3d 139,142 (4th Cir.1997) (citing *Ex Parte Young,* 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Thus, properly before the court are Plaintiff's claims for damages against the individual Defendants in their individual capacities, and his claim for injunctive relief against the individual Defendants in their official capacities.

Individual Defendants assert qualified immunity as a defense. In *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court explained the qualified immunity analysis. First, the court must determine if the facts alleged show the defendant's conduct violated a constitutional right. *Id.* Second, the court must determine if the constitutional right was clearly established. *Id.* Only after the court has determined whether or not a constitutional right has been violated should it move to the next step of determining if the right is clearly established.*Id.*

In this case, Magistrate Judge Kosko throughly reviewed the constitutionality of the Act and recommended a conclusion that Defendants' conduct does not violate a constitutional right. The Magistrate Judge reviewed the SVP Act in light of the South Carolina Supreme Court's opinion in *In re Treatment and Care of Luckabaugh,* 351 S.C. 122, 568 S.E.2d 338, (2002), and recommended a finding that the act pass constitutional muster.

Plaintiff makes only general and conclusory objections to the Magistrate Judge's findings. Plaintiff merely restates the factual allegations of his complaint and amended complaint, and reasserts

that such allegations warrant a finding in his favor. Because the objections are conclusory, the court is not required to conduct a de novo review of the Magistrate Judge's Report. *SeeOrpiano v. Johnson,* 687 F.2d 44, 47-48. (4th Cir.1982). Nonetheless, the court has conducted a through review of the Magistrate Judge's Report and concurs in the Magistrates Judge's recommendation.

Conclusion

***3** After carefully reviewing the entire record, the court finds the Report and Recommendation of the Magistrate Judge properly addresses Plaintiff's claims against the Defendants and correctly applies the applicable law. Accordingly, the court adopts the Report and Recommendation of the Magistrate Judge and incorporates it herein by reference. For the reasons stated therein and in this order, Defendants' motion for summary judgment is granted and Plaintiff's § 1983 action is dismissed.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

KOSKO, Magistrate J.

I. INTRODUCTION

This civil rights action, brought by a person civilly committed as a sexually violent predator ("SVP"), proceeding *pro se* and *in forma pauperis* under 42 U.S.C. § 1983,[FN1] is before the undersigned United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b).

FN1.42 U.S.C. § 1983 provides, In pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983.

Danny G. Williams ("Plaintiff" or "Williams") filed this action on March 31, 2003 against George P. Gintoli ("Gintoli"), Director of the South Carolina Department of Mental Health ("SCDMH"), Dr. W. Russell Hughes ("Hughes"), C.E.O. of the Behavior Disorders Treatment Program ("BDTP"), Brenda E. Young-Rice ("Rice"), Program Manager of BDTP, Elizabeth Hall ("Hall"), Division Director of Public Safety, and Doug Cochran, J.D., Director of Client Advocacy for the SCDMH ("Attorney Cochran). Collectively, Gintoli, Hughes, Young-Rice, Hall and Cochran will be referred to herein as the "Defendants". Williams is suing the Defendants both in their official capacities and their individual capacities. He seeks monetary damages and injunctive relief.

II. PRO SE *COMPLAINT*

Williams commenced this case as a *pro se* litigant, and his initial pleadings are accorded liberal construction, as *pro se* pleadings are held to a less stringent standard than those drafted by attorneys. *Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (*per curiam*). The mandated liberal construction afforded to *pro se* pleadings

means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented. *Barnett v. Hargett,* 174 F.3d 1128 (10th Cir.1999). Likewise, a court may not construct the plaintiff's legal arguments for him (*Small v. Endicott,* 998 F.2d 411 (7th Cir.1993)) or "conjure up questions never squarely presented" to the court. *Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir.1985), *cert. denied,*475 U.S. 1088, 106 S.Ct. 1475, 89 L.Ed.2d 729 (1986). Moreover, the Court cannot ignore a clear failure in the pleading to allege facts supporting a claim cognizable in a federal district court. *Weller v. Department of Social Services,* 901 F.2d 387 (4th Cir.1990). Such is the case with the present Complaint.

III. PERTINENT PROCEDURAL HISTORY OF THE CASE

***4** Williams brought suit against the Defendants, alleging that on May 7, 1999, he was involuntarily civilly committed by the Anderson County Court of Common Pleas pursuant to the South Carolina Sexually Violent Predator Act, S.C.Code Ann. § 44-48-10*et seq.* (the "SVP Act"). Plaintiff claims that the Defendants have failed to provide adequate mental health treatment to him in violation of his rights under the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments and requests a jury trial. [1-1]

An Order was issued on April 14, 2003 directing the issuance of Summonses against the above-captioned Defendants, with notification to Williams of the change of address rule. [3-1] After Defendants were served with copies of the Complaint, they answered the Complaint on May 1, 2003[9-1], setting forth numerous defenses and requesting that the Complaint be dismissed pursuant to Fed.R.Civ.P. 12.

On May 29, 2003 the Plaintiff moved to this Court to accept the filing of an amended Complaint after the Defendants had answered. [15-1] The Motion was unopposed, and on May 29, 2003, the undersigned granted Plaintiff's Motion to Amend the Complaint. [18-1] Plaintiff's Amended Complaint specifically requested that this Court declare the SVP Act unconstitutional on its face and as implemented. [15-1]

On August 13, 2003 the Defendants filed a Motion to Dismiss or in the alternative for Summary Judgment and Memorandum in Support thereof. [20-1; 21-1] On August 18, 2003, the undersigned issued an Order pursuant to *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir.1975), notifying Williams of the dismissal procedure and the possible consequences if he failed to adequately respond to the Motion for Summary Judgment within thirty-four (34) days.[FN2][22-1] Williams responded by filing a Return and Opposition to Defendants' Motion. [23-1] This matter is now ripe for review by this Court.

FN2. The explanation to the *pro se* litigant is required by *Roseboro v. Garrison,* 528 F.2d 309 (4th Cir.1975), which was a civil rights case.

IV. SUMMARY JUDGMENT STANDARD

Pursuant to Fed.R.Civ.P. 56(c), a district court must enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."*Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed.R.Civ.P. 56(c). To avoid summary judgment on Defendants' motion, the Plaintiff must produce evidence creating a genuine issue of material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insuffi-

cient; there must be evidence on which the jury could reasonably find for the plaintiff."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."*Anderson, Id.* at 255.

V. FACTS

***5** In 1998, the South Carolina General Assembly confronted the problem of recidivist sex offenders [FN3] by passing the SVP Act, S.C.Code Ann. §§ 44-48-10-170. (Law.Co-op.2002). South Carolina's SVP Act provides for the involuntary civil commitment to the custody of the SCDMH of sexually violent predators who are "mentally abnormal and extremely dangerous." S.C.Code § 44-48-20.

FN3. The General Assembly found:

....that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators will engage in repeat acts of sexual violence if not treated for their mental conditions is significant. Because the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society, the General Assembly determines that a separate, involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators is necessary. The General Assembly also determines that, because of the nature of the mental conditions from which sexually violent predators suffer and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes. The civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community. S.C.Code Ann. § 44-48-20 (Law.Co-op.).

Williams was found to be an SVP and involuntarily civilly committed to the jurisdiction of the SCDMH on May 7, 1999. He has been housed in the Edisto Unit (the SVP Unit) at the SCDC's Broad River Correctional Institution since that time. Williams alleges a violation of his rights under 42 U.S.C. § 1983 because he claims he is receiving constitutionally inadequate mental health treatment. Williams further alleges that while the purpose of the SVP Act is to provide care and treatment for the individuals in the custody of the SCDMH-BDTP, the Act actually is punitive in nature because he has not been provided adequate, meaningful and reasonable sex offender treatment. Plaintiff alleges that the BDTP does not provide "any Least Restrictive Alternatives, de-escalating restraints, step down or community re-integration phases" or any other sex offender therapy that would afford Plaintiff with the opportunity for release. [1-1 at p. 4.] Plaintiff further alleges that he successfully completed the Sex Offender program that was in place when he was committed.*Id.*

VI. LAW AND ANALYSIS

A. South Carolina's Sexually Violent Predator Act is a Civil Statute.

In *Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court upheld the constitutionality of Kansas' SVP Act, after which the South Carolina Act is modeled. *SeeIn re Treatment and Care of Luckabaugh,* 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).*Hendricks* reaffirmed the proposition, as first stated in *Jacobson v. Massachusetts,* 197 U.S. 11, 26, 25 S.Ct. 358, 49 L.Ed. 643 (1905) that

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free

from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

The South Carolina Supreme Court has repeatedly ruled that the SVP Act is a civil statute, not a criminal statute, and therefore provides a non-punitive scheme of incarceration. *Luckabaugh,* 351 S.C. at 135, 568 S.E.2d at 344;*seealsoIn re Care and Treatment of McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001); *In re Matthews,* 345 S.C. 638, 550 S.E.2d 311 (2001).

The Plaintiff claims that the programs outlined in the Act are punitive as applied to him. The United States Supreme Court has expressly disapproved of evaluating the civil nature of an Act by reference to the effect that Act has on a single individual. *Hudson v. United States,* 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). The Supreme Court has stated that the "clearest proof" is required to override legislative intent and conclude that an Act denominated civil is punitive in effect. Id.

***6** In *Seling v. Young,* 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001), the United States Supreme Court reviewed Washington State's Sexually Violent Predator's Act. In *Young,* the therapists had a policy of withholding privileges for refusal to submit to treatment. Seling complained, among other issues, that this withholding of privileges made the Sexually Violent Predator Act punitive "as applied" to Seling and he challenged the Act on double jeopardy and ex post facto grounds and sough release from confinement.*Seling v. Young,* 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734. The Supreme Court rejected a scheme where the Act's punitive intent would be evaluated "as applied" basis, stating that any "as applied" approach would be unworkable. Instead, the Court stated that the plaintiff was essentially claiming that his conditions of confinement were too restrictive, just as Williams has done in the present case. The Court noted that these conditions were largely explained by the State's goal to incapacitate, not to punish. *Id.*

B. The Exclusion of Williams from the Definition of "Patient" under the Mental Health Statute Does Not Demonstrate That the Legislature Intended to Punish the Plaintiff.

Plaintiff also contends that S.C.Code Ann § 44-22-10(11), in which the South Carolina Legislature specifically exempted sexually violent predators from the rights conferred to other involuntary committed mental patients, illustrates that the legislature intended to punish him.[FN4]The South Carolina Supreme Court has already ruled on this matter in *Luckabaugh,* 351 S.C. at 137, 568 S.E.2d at 345-346. In evaluating Luckabaugh's contention that the SVP Act is punitive because it treats persons involuntarily committed under the Act differently from other involuntarily committed mental patients, the South Carolina Supreme Court noted that a similar argument had been posed in a challenge to Iowa's sexually violent predator act. The South Carolina Supreme Court noted:

> FN4. Chapter 22 addresses the Rights of Mental Health Patients, and states in pertient part: "Patient" means an individual undergoing treatment in the [D]epartment [of Mental Health]; however, the term does not include a person committed to the [D]epartment pursuant to Chapter 48 of Title 44." S.C.Code Ann. § 44-22-10(11) (2002).

The Iowa Supreme Court held Garren "failed to elucidate any supportive reasoning as to why, if such privileges are not accorded under [Iowa's Sexually Violent Predator Act], this fact indicates the punitive nature of the statute."[*citing in re Detention of Garren,* 620 N.W.2d 275, 281 (Iowa 2000)] The court noted: "The constitution does not require [a state] to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals."*Id.*

Hendricks, 521 U .S. at 377, 117 S.Ct. At 2089, 138 L.Ed.2d at 524 (Breyer, J., dissenting)).

Luckabaugh, 351 S.C. at 138, 568 S.E.2d at 346 (internal citation added).

The *Luckabaugh* Court concluded that a statute creating two types of civil commitment is not *per se* punitive and that the Plaintiff must provide evidence that the act is so punitive in effect as to negate the Legislature's intent to create a civil statute. *Id.* Williams has failed to provide the requisite evidence that the act is so punitive as to negate the Legislature's intent.

*7 Moreover, to the extent that Williams argues that the Legislature intended to punish the sexually violent predator with the enactment of S.C.Code Ann § 44-22-10(11), this argument must fail as a matter of law because the determination of the non-punitive nature of the legislative intent in implementing the Act and S.C.Code Ann § 44-22-10(11) has been consistently upheld by the South Carolina Supreme Court. Finally, a statute creating two types of civil commitment is not *per se* unconstitutional. *See,e.g.,Luckabaugh,* 351 S.C. at 138, 568 S.E.2d at 346;*In the Matter of Matthews,* 345 S.C. at 650-651, 550 S.E.2d at 317. The Court must grant Defendants' Motion for Summary Judgment on this cause of action.

C. The Inter-Agency Agreement Between SCDC and SCDMH Does Not Make the SVP Act a Punitive Measure As It Relates To The Plaintiff

On July 22, 2002, the South Carolina Supreme Court handed down *Luckabaugh* and *In re Allen,* 351 S.C. 153, 568 S.E.2d 354 (2002). Luckabaugh asserted that the Sexually Violent Predator Act was penal in purpose or nature. In support of his assertion, he stated (1) the nature of the confinement due to the inter-agency agreement between the SCDMH and SCDC; (2) individuals committed under the act are not entitled to rights of other patients in the care of the SCDMH; and (3) the Act requires a previous criminal conviction.

As to Luckabaugh's first contention, the Court noted that SCDMH and SCDC had entered into an inter-agency agreement which provides the Edisto Unit of Broad River Correctional Institution to be used to house sexually violent predators. Under the agreement, the SCDMH retains all control, care and treatment aspects inside the Edisto Unit, including internal guards, routine maintenance and sanitation. SCDMH arranges for medical care of committed person. SCDC provides outside security, meals, laundry services and chaplain services. (Inter-agency Agreement between the South Carolina Department of Corrections and the South Carolina Department of Mental Health (Apr. 29, 1998)).

The Court further noted that, while SCDC provided a secure environment to house the sexually violent predator, the SCDMH provided the care and treatment. Noting that the issue had previously been addressed in *Matthews,* the Court rejected Luckabaugh's contention, citing the previsions of S.C.Code Section 44-48-170. The Court relied upon *Allen v. Illinois,* 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986), in which the Court dealt with a similar situation in which Allen had been placed in a psychiatric center housed within a maximum security prison. The Court held that the Illinois law did not violate the United States Constitution because those facts "did not transform the State's intent to treat into a intent to punish."*Id.,* 478 U.S. at 373. The Court opined that Luckabaugh had failed to prove that the living conditions, provided for by the inter-agency agreement between SCDMH and SCDC, were so punitive in effect as to negate the Legislature's intent to create a civil statute.

***8** Likewise, Williams has failed to put forth sufficient evidence to show that the inter-agency agreement between SCDMH and SCDC is so punitive as to negate the Legislature's intent. Williams claims the Defendants have acted to deny him constitutional rights guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Williams claims that while the

stated purpose of the SVP Act is to provide control, care and treatment for persons who fit the statutory definition of a SVP, the care and treatment provided by the DMH-BDTP is constitutionally inadequate. Specifically, he complains that his housing within the confines of a SCDC maximum security prison does not comport with the constitutional rights pertaining to care and treatment to which he is entitled as a civilly committed person under the SC SVP Act. Williams further argues that he has been confined in excessively restricted and unreasonably punitive conditions which has converted the purported goals of care and treatment into punishment. Williams alleges that he is being denied meaningful mental health care and treatment due to Defendants' lack of providing appropriate treatment and programs to provide him with meaningful sex offender therapy.

Contrary to Williams' allegations, he is not being punished as a criminal, but instead, is receiving treatment for his sexually violent behavior. The United States Supreme Court has held: "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded."*Kansas v. Hendricks,* 521 U.S. at 362,*citingUnited States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)."Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual."*Addington v. Texas,* 441 U.S. 418 at 425, 99 S.Ct. 1804, 60 L.Ed.2d 323

In deciding whether a civilly-institutionalized individual's constitutional rights have been violated, the courts must balance his or her liberty interests against the relevant state interests, but deference must be given to decisions of professionals. *Youngberg,* 457 U.S. at 321. "[T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."*Youngberg,* 457 U.S. at 323.

Deference to professionals ensures that federal courts do not unnecessarily interfere with the internal operations of state institutions. *Youngberg,* 457 U.S. at 322. The Defendants Young-Rice and Hughes each have provided Affidavits in support of Defendants' Motion. Both state that the BDTP is not punitive, but rehabilitative in that the program provides for individual counseling, sex offender treatment, activity therapy, wellness training, anger management training, and self-image therapy. In addition, treatment is available for drug and alcohol abuse.[FN5]Furthermore, the Defendants have presented this Court with a copy of the BDTP Treatment Incentive System, which explains that the System is structured as a six-level system in which the individual SVP can ascend to a higher levels, and therefore enjoy additional privileges, through active participation in treatment and the demonstration of positive behaviors.[FN6] These Defendants' affidavits, as well as the written Explanation of Levels for the BDTP Treatment Incentive System, all refute Williams allegations that he has suffered violations of his constitutional rights or that he has been subjected to punitive treatment. In the present case, the fact that the SCDC and the DMH have entered into an agreement to house sexually violent predators in the Edisto Unit of the Broad River Correctional Institution simply does not translate into evidence that the SVP Act is punitive in nature. Indeed, this argument has already been addressed and resolved by *Luckabough,* 351 S.C. at 136, 568 S.E.2d at 345. Accordingly, Williams' argument that the SVP Act is penal in nature, and that his constitutional rights have been violated by being housed in the Edisto Unit, all are without merit.

FN5. Affidavit of Young-Rice at p. 2; Affidavit of Hughes at p. 2, attached as Exibits A and B respectively to Defendants' Motion. [21-1]

FN6.*See* BDTP Treatment Incentive System, attached to Affidavit of Young-Rice, attached as Exhibit A to Defendants' Motion.

RECOMMENDATION

***9** It appears that there is no genuine issue as to any material fact, and that the Defendants are entitled to judgment as a matter of law. Accordingly, for the aforementioned reasons, it is recommended that the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment [20-1; 20-2] be granted.

D.S.C.,2004.
Williams v. Gintoli
Not Reported in F.Supp.2d, 2004 WL 1474658 (D.S.C.)

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119 Fed.Appx. 190, 2004 WL 2801823 (C.A.10 (Okla.))
(Cite as: 119 Fed.Appx. 190)

Walters v. Corrections Corp. of America, C.A.10 (Okla.),2004.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals, Tenth Circuit.
Cortez Darnell WALTERS, Plaintiff-Appellant,
v.
CORRECTIONS CORPORATION OF AMERICA; Steer, Captain; Sean Sweeger; Darren Swenson, Defendants-Appellees,
andMcDaniel Hillfoyle, Defendant.
No. 04-6067

Dec. 7, 2004

Background: State inmate filed § 1983 action alleging that prison policies and procedures for mail handling deprived him of check, and that prison guard violated his Eighth Amendment rights. The United States District Court for the District of Oklahoma dismissed complaint, and inmate appealed.

Holdings: The Court of Appeals, Briscoe, Circuit Judge, held that:

(1) inmate's allegation that prison's mail handling policy resulted in deprivation of property was sufficient to state a 1983 claim, and

(2) guard did not violate Eighth Amendment by shoving inmate on two occasions.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Constitutional Law 92 ⇐4822

92 Constitutional Law
92XXVI Due Process
92XXVI(H) Criminal Law
92XXVI(H)7 Imprisonment and Incidents Thereof
92k4822 k. Property and Employment. Most Cited Cases
(Formerly 92k272(2))

Convicts 98 ⇐3

98 Convicts
98k3 k. Property and Conveyances. Most Cited Cases
State inmate's allegation that prison's mail handling policy resulted in failure to credit his account with check from clerk of court was sufficient to state § 1983 claim for deprivation of property without due process, even if adequate state postdeprivation remedy was available. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[2] Prisons 310 ⇐13(4)

310 Prisons
310k13 Custody and Control of Prisoners
310k13(4) k. Particular Violations, Punishments and Deprivations; Use of Force. Most Cited Cases

Sentencing and Punishment 350H ⇐1548

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(G) Conditions of Confinement
350HK1548 k. Use of Force. Most Cited Cases
Prison guard did not violate Eighth Amendment by shoving inmate on two occasions, even if sole purpose of application of force was to cause fright and fear, where inmate did not allege he suffered

any injury as result of being pushed. U.S.C.A. Const.Amend. 8

***190** Ortez Darrel Walters, Davis Correctional Facility, Holdenville OK, pro se
Darrell L. Moore, cited L. Neffzger, Pryor, OK, Defendant-Appellee
J. Kevin Behrens, Oklahoma Attorney General, Oklahoma City, OK, for Defendant.

Before TACHA, Chief Judge, BRISCOE and HARTZ, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.BRISCOE, Circuit Judge.

***1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th *191 Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Ortez Darrell Walters, a pro se state prisoner, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint pursuant to 42 U.S.C. § 1997e(c)(2) and 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim on which relief can be granted, and dismissal without prejudice of his supplemental state law tort claims against defendant Sean Sweeden. We affirm in part, reverse in part, and remand.

Construing his complaint liberally, Walters contends the district court erred (1) in dismissing his claim for deprivation of property in $150 obtained by Corrections Corporation of America (CCA), which he alleged resulted from its policies and from inadequate training of its mail room employees; (2) in dismissing his claim for being deprived of access to state administrative grievance procedures; (3) in dismissing his claim against defendant Daren Swenson for failure to adequately supervise and train mail room employees, resulting in deprivation of his property rights; (4) in dismissing his claim that Sweeden violated his rights under the Eighth Amendment; (5) in dismissing his claims against Swenson and Steer for failure to discipline and supervise Sweeden to prevent the alleged Eighth Amendment violation.

This court reviews de novo dismissals under § 1915(e)(2)(B)(ii). *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 806 (10th Cir.1999). Dismissals under § 1997e(c)(2) are also reviewed de novo. *Bazzetta v. Scott*, 136 F.3d 1053, 1054 (5th Cir.1998)

Writ of certiorari

Although it is unclear what relief Walters seeks from this court in his petition for writ of certiorari, it appears he is asking us to not rule on his pending appeal but rather send his case directly to the United States Supreme Court. We must deny Walters request for the simple reason that it is the Supreme Court, and not any lower court, that decides whether it will take a case through the granting of a writ of certiorari.

Access to state administrative grievance procedure

Walters alleges various defendants deprived him of access to state grievance procedures, in violation of the Constitution. Although he references problems with the grievance procedures in his opening brief, it is unclear whether he actually is appealing the dismissal of those claims.

Construing his brief liberally, we will consider the claims. "When the claim underlying the administrative grievance involves a constitutional right, the prisoner's right to petition the government for redress is the right of access to the courts, which is not compromised by the prison's refusal to entertain his grievance." *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir.1991). As is evident from the file before us, Walters has not been deprived of access to the courts. Accordingly, any alleged denial of access to state administrative grievance procedures has not resulted in a violation of his constitutional rights.

CCA policies deprived Walters of $150

****2** Walters alleged the CCA policies and procedures for mail handling deprived him of $150. He contends CCA's policies were deliberately indifferent to the proper handling of letters containing checks sent to prisoners where the return address and check were from the clerk of court rather than from an individual. He argues a check sent in such a manner should have been credited to his account, or at least information regarding the mail should have been kept recorded when it was ***192** mailed elsewhere, including information regarding where the mail was sent. Walters asserts that as a result of CCA's mail handling policy, the $150 returned to him by the clerk of court was never credited to his account and was sent elsewhere without any record of where it was sent. He alleges that CCA's policies and inadequate training and supervision of its personnel deprived him of his property.

The magistrate judge and, in turn, the district court, relied on *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), and *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), to dismiss this claim. The magistrate judge noted the Supreme Court has held that neither negligent nor intentional random or unauthorized deprivations of property under color of state law are actionable where a plaintiff has an adequate state post-deprivation remedy." R. Report & Recommendation at 4. The magistrate judge recommended that "[i]n light of the adequate post-deprivation state remedies, Plaintiff's claim for damages based on deprivation of property fails to state a viable claim under Section 1983." *Id.* at 5. The district court adopted the magistrate judge's findings and conclusions.

[1] We disagree with the district court's reliance on *Hudson* and *Parratt* to dismiss Walters' claims arising out of the CCA mail handling procedures. "Both *Parratt* and *Hudson* deal with random and unauthorized deprivations of property rather than deprivations according to some established state policy, procedure, or custom." *Gillihan v. Shillinger*, 872 F.2d 935, 939 (10th Cir.1989). In *Gillihan*, this court concluded where "the deprivation is not random and unauthorized, but is pursuant to an affirmatively established or de facto policy, procedure, or custom, the state has the power to control the deprivation." *Id.* As a result, in cases where the property deprivation is not random and unauthorized, "the availability of an adequate state post-deprivation remedy is irrelevant and does not bar a § 1983 claim." *Id.* at 940. *See also Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1112 (10th Cir.2004) (en banc) (*cert. granted*, 543 U.S. 955, 125 S.Ct. 417, 160 L.Ed.2d 316 (2004)) (stating "when the deprivation is caused by established state procedures, the existence of an adequate remedy at state law does not extinguish a procedural due process claim"). Because Walters contends the prison procedures themselves created the risk of his being deprived of property and the ultimate loss of his property, the district court erred in determining his claims were subject to dismissal.

Eighth Amendment

****3** Walters also claimed that defendant Sweeden pushed him twice violating his Eighth Amendment rights. Walters alleged in his complaint that the sole purpose of this application of force was to "cause fright and fear" and was inspired by Sweeden's anger related to Walters reporting the names of employees he feared.

Although Walters alleged an improper state of mind, he did not allege he suffered any injury as a result of being pushed.

Not "every malevolent touch by a prison guard gives rise to a federal cause of action. ... Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (internal citations and quotations omitted). "The Eighth Amendment's prohibition ... necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to ***193** the conscience of mankind." *Id.* at 9-10 (internal quotations omitted).

Walters allegedly was pushed twice and stumbled, although there is no indication that he hit the floor. In *DeWalt v. Carter*, 224 F.3d 607 (7th Cir.2000), the Seventh Circuit considered circumstances similar to this case, although the physical injury there was more substantial.[FN1] Officer Smith informed

> FN1. Although Walters mentions the possibility of amending his complaint, he has not suggested either in his objections to the magistrate judge's report and recommendation or before this court that such amendment would include adding some type of physical injury. Rather, he repeatedly has insisted a physical injury is not necessary to show an Eighth Amendment violation.

DeWalt that he was receiving the disciplinary report because he had filed a grievance against Officer Young and because correctional officers "stick together." As Mr. DeWalt walked away he told Officer Smith his actions were unprofessional, whereupon Officer Smith jumped up and shoved Mr. DeWalt toward the doorway and into the door frame. Mr. DeWalt suffered bruising on his back where he hit the door frame; the prison medical staff, however, did not note any visible injury and did not order x-rays.

Id. at 610-11. The court concluded that " Officer Smith's simple act of shoving Mr. DeWalt qualifies as the kind of de minimis use of force that does not constitute cruel and unusual punishment." *Id.* at 620.

[2] As was the case in *DeWalt*, Sweeden's twice pushing Walters constitutes a "de minimis use[ ] of physical force" that "is not of a sort repugnant to the conscience of mankind." *See Hudson*, 503 U.S. at 10 (internal quotations omitted). Accordingly, Sweeden's alleged actions were not cruel and unusual under the Eighth Amendment.

Walters also raises claims against Steer and Swenson for improper supervision of Sweeden, failure to discipline Sweeden, and failure to protect him from Sweeden. However, "[a] supervisor is not liable under § 1983 unless an 'affirmative link' exists between the constitutional deprivation and ... the supervisor's personal participation, his [or her] exercise of control or direction, or his [or her] failure to supervise." *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir.1993). Because the assault and battery that Walters allegedly suffered does not rise to the level of a constitutional deprivation, Steer and Swenson cannot be held liable under § 1983.

***4** The district court's dismissal of Walters' claims related to the alleged deprivation of property without due process as frivolous was erroneous and we REVERSE and REMAND for further proceedings with regard to those claims. As regards his other claims, we AFFIRM. Walters' motion to proceed on appeal without prepayment of fees is GRANTED. Walters is reminded of his obligation to continue making partial payments toward the balance of those fees until they are paid in full. Walters' motion for a 15-day extension of time to make a partial payment toward fees is GRANTED.

C.A.10 (Okla.),2004
Walters v. Corrections Corp. Of America
119 Fed.Appx. 190, 2004 WL 2801823 (C.A.10 (Okla.))

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5 Fed.Appx. 825 Page 1
5 Fed.Appx. 825, 2001 WL 201946 (C.A.10 (Colo.)), 2001 DJCAR 1133
(Cite as: 5 Fed.Appx. 825)

Sims v. Miller
C.A.10 (Colo.),2001.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)
United States Court of Appeals,Tenth Circuit.
Larry Darnell SIMS, Plaintiff-Appellant,
v.
Frank MILLER; Randy Henderson; Susan Jones; Lt. Blackmore; Lt. Barr; W.H. Jordon; K. Baxter; Bonnie Barr; c/o Stephens; Ken Shiftlett; Lt. Iniss; Frank E. Ruybalid; Aristedes W. Zavaras; Lt. Begrin; Lt. Hamilton; Lt. Frank Ortiz; Ken Topliss; Anthony Carrochi; Major Watson; Major Lynn; Lt. Whittington; Lt. Jaramillo; c/o Watson; c/o Brewer; Captain John Hyatt; Gloria Masterson; Gary Neet; Sgt. Harold Tuttle; Jackie Gomez, c/o; Lt. Cupp; Capt. Buxman; Sgt. Shumer; Sgt. Jaramillo; Sgt. Figero; Lt. Ernster; Lt. Griag; Sgt. Miller; Dan Schlesinger; Carl Zenon, Director Regional One; Sgt. Garcia and Major Ried, Defendants-Appellees.
Nos. 00-1210, 00-1202.

Feb. 28, 2001.

Inmate brought civil rights action, alleging violations of his constitutional rights by named and unnamed employees at several institutions within the Colorado Department of Corrections (CDOC). The district court granted summary judgment to served defendants and dismissed as to unserved defendants, and denied motion for relief from judgment, and inmate appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) mere pushing and shoving of inmate did not give rise to a federal cause of action for excessive force, and (2) appeals were frivolous.

Appeals dismissed.

West Headnotes

|1| Federal Courts 170B ⇐915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases
To the extent that inmate, on appeal from summary judgment and dismissal in his civil rights action, listed numerous issues but failed to discuss them, they were waived.

|2| Federal Courts 170B ⇐617

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk617 k. Sufficiency of Presentation of Questions. Most Cited Cases
Claims which were not considered by the district court, being first raised in motion for relief from judgment, and which were vague and conclusory, would not be considered on appeal from grant of summary judgment to corrections officers in inmate's civil rights action. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

|3| Prisons 310 ⇐13(4)

310 Prisons
310k13 Custody and Control of Prisoners
310k13(4) k. Particular Violations, Punishments, and Deprivations; Use of Force. Most Cited Cases

Sentencing and Punishment 350H ⇐1548

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(H) Conditions of Confinement
350Hk1548 k. Use of Force. Most Cited

Cases
Mere pushing and shoving of inmate did not give rise to a federal cause of action for excessive force in violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8.

|4| Federal Courts 170B ⇐893

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk893 k. Particular Errors as Harmless or Prejudicial. Most Cited Cases
Though the authority for the district court's special order of reference to the Chief Bankruptcy Judge for the limited purpose of conducting a telephone conference to inquire into the nature and scope of inmate's civil rights claims was unclear, inmate was not prejudiced since the bankruptcy judge did nothing of substance and inmate was not delayed by this action.

|5| United States Magistrates 394 ⇐25

394 United States Magistrates
394k24 Review and Supervision by District Court
394k25 k. Proceedings for Review; Objection to Report. Most Cited Cases
Rule governing the time for filing documents and the circumstances under which an enlargement of time for filing may be granted was inapplicable to the extent plaintiff sought an enlargement of time to object to the magistrate judge's report and recommendation, where the district court had accepted the magistrate judge's report and recommendation and dismissed the action before the motion was filed. Fed.Rules Civ.Proc.Rule 6(b), 28 U.S.C.A.

|6| Federal Civil Procedure 170A ⇐2646

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2646 k. Discretion of Court. Most Cited Cases
A motion for relief from judgment is addressed to the sound discretion of the district court. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

|7| Federal Courts 170B ⇐915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases
Any challenge on appeal to denial of motion for relief from judgment was deemed waived, where plaintiff's arguments on appeal were addressed to the dismissal of his complaint, not the district court's post-judgment ruling. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

|8| Federal Courts 170B ⇐663

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk662 Proceedings in Forma Pauperis
170Bk663 k. Grounds for Permitting or Refusing. Most Cited Cases
Inmate's appeals from summary judgment in civil rights action in which most of his allegations were either vague and conclusory or were lacking in specificity as to time, place, and particular defendant associated with the incident in question were frivolous and subject to dismissal under in forma pauperis statute and, given prior frivolous suits, inmate could not proceed in forma pauperis in any future federal lawsuits, other than habeas, which do not involve imminent danger of serious physical injury. 28 U.S.C.A. § 1915(e)(2)(B)(i), (g).

***827** Before BRISCOE, ANDERSON, and MURPHY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.BRISCOE, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See*Fed.R.App.P. 34(a)(2); 10th Cir.R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiff seeks review of the district court's order and judgment dismissing his civil rights complaint brought pursuant to 42 U.S.C. § 1983 seeking, among other remedies, in excess of $25 million (our No. 00-1202) and the order denying his subsequent motion to vacate the judgment (our No. 00-1210). He also asks this court for leave to proceed with the appeals in forma pauperis. We have jurisdiction, 28 U.S.C. § 1291, and we concur in the district court's analysis in all respects. In addition, we deny plaintiff's motions for leave to proceed in forma pauperis because the appeals are frivolous.

The operative pleading in this action was plaintiff's second amended complaint, filed January 27, 1999,[FN1] naming forty-one defendants, all of whom are or were connected to the Colorado Department of Corrections (CDOC). Following defendants' motions for summary judgment and dismissal, the case was referred to a magistrate judge, who recommended granting summary judgment to the eleven defendants who had been served and dismissing the complaint as to the remaining unserved defendants.

FN1. Technically the complaint was filed March 9, 1999. However, it was lodged with the district court in January and is the document referred to by the magistrate and district court judges as the second amended complaint.

In his second amended complaint, as well as in the earlier complaints and numerous motions, letters, and pleadings filed with the court over the course of two and one-half years, plaintiff alleges numerous alleged violations of his constitutional rights by named and unnamed employees at several institutions within the (CDOC). Most of his allegations are either vague and conclusory (e.g., unknown John Does made racial and sexual remarks and slurs towards him; the mailroom staff refused to mail out his legal mail; two unserved defendants placed him under a great deal of stress, duress and intimidation) or are lacking in specificity as to time, place, and particular defendant associated with the incident in question. Moreover, those factual allegations that are described with sufficient specificity do not rise to the level of constitutional violations.

***828** The magistrate judge fully and thoroughly considered plaintiffs claims, grouping them into general categories for purposes of analysis: threats, denial of access to courts and Fourth Amendment violations, use of excessive force, due process violations, failure to follow grievance procedures, retaliation, and conspiracy. Specifically, the magistrate judge determined that the alleged threats and verbal harassment did not rise to the level of constitutional violations. *See Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir.1979). He further determined that plaintiff was not denied access to the courts because his letter to the Secretary of State was not legal mail and because other items the defendants allegedly refused to mail in no way hindered plaintiff's legal efforts. The magistrate judge also held that the search of plaintiff's cell did not constitute an impermissible search in violation of the Fourth Amendment. *See Hudson v. Palmer,* 468 U.S. 517, 525-26, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In addition, the alleged seizure of plaintiff's own legal papers did not state a constitutional deprivation because plaintiff nonetheless managed to continue the prosecution of this and other cases; indeed, he managed to file the second amended complaint in this case after the alleged seizure of his papers in December of 1997, there-

fore failing to demonstrate any injury by being frustrated or impeded in his pursuit of a nonfrivolous legal claim. *Lewis v. Casey,* 518 U.S. 343, 352-54, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Similarly, plaintiff's allegations of excessive force were at best de minimus and not rising to the level of a constitutional violation. *See Hudson v. McMillian,* 503 U.S. 1, 9-10, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

****2** The magistrate judge further determined that plaintiff's claim of due process violations in connection with prison disciplinary proceedings did not implicate a constitutionally protected liberty interest. The magistrate judge also concluded that insofar as plaintiff contended that CDOC officials had failed to comply with the prison grievance procedures, he had failed to allege the violation of a federal constitutional right; he also rejected plaintiff's claim of retaliation for lack of specific facts showing retaliation based on the exercise of constitutional rights. Finally, the magistrate judge concluded that plaintiff had failed to allege facts sufficient to establish a claim of conspiracy under 42 U.S.C. § 1985(3).

Defendant did not file a timely objection to the magistrate judge's November 22, 1999, report and recommendation. Nonetheless, the district court reviewed the recommendation, amended complaint, parties' briefs and the applicable case law and statutes prior to dismissing the complaint and entering judgment for the defendants on December 14. R. doc. 115. On December 19, plaintiff sent a letter objecting to the dismissal, seeking an extension of time, and claiming he had not had the opportunity to object to the magistrate judge's recommendation because he had been relocated to a different institution on November 18. He further stated he was unable to gain access to the law library immediately after the transfer. *Id.* doc. 117. Plaintiff did not allege that he had not received the magistrate judge's recommendation. On January 14, 2000, he filed a formal motion for extension of time, claiming he had been denied access to the law library. *Id.* doc. 118. This was construed as a motion for extension of time in which to appeal and was deemed unnecessary, as the notice of appeal (also filed January 14) was timely.

On March 14, the district court construed plaintiff's November 19 letter as a request to file out-of-time objections to the magistrate judge's recommendation and denied it for plaintiff's failure to notify the ***829** court within ten days of the change in his address, as required by the court's local rules. *Id.* doc. 122. The court further suggested that any relief plaintiff wished to seek from the operation of the judgment needed to be filed pursuant to Fed.R.Civ.P. 60(b).

Plaintiff filed his Rule 60(b) motion, which the district court ultimately denied, on April 12. However, in that motion, plaintiff alleged he timely filed a notice of change of address on November 22, 1999. R. Doc. 124 at 3. Accepting this latter claim as true, we have determined in the interest of justice to review the underlying action on the merits. *See Moore v. United States,* 950 F.2d 656, 659 (10th Cir.1991).

In his brief on appeal, plaintiff makes the following arguments:

1. The district court erred in granting summary judgment because defendants did not mention in their summary judgment motion the "general abusive behavior" by defendants, including alleged " 'sexual harassment,' " in violation of a United Nations Treaty, and an alleged rape committed on plaintiff by another inmate. *See* Appellant's Br. at 30.

****3** 2. Genuine issues of material fact exist concerning the alleged rape and its subsequent cover-up (and denial of medical care after the rape). *See id.* at 32.

3. Excessive force was used against him in violation of the Eighth Amendment. *See id.* at 33.

4. The district court violated plaintiff's First and Seventh Amendment rights because he was misled into thinking there would be a trial, the action was never properly served on the defendants,

the scheduling conference should have been conducted by a magistrate judge, not a bankruptcy judge, and that certain procedural rules should have been followed. *See id.* at 34-37.

[1] Most of the brief, however, describes the proceedings as listed on the district court's docket sheet and reiterates certain factual claims listed in the amended complaint. This recitation does not constitute argument or authority in support of plaintiff's claims. To the extent he has listed numerous issues but failed to discuss them, they are waived. *See Adler v. Wal-Mart Stores, Inc.* 144 F.3d 664, 679 (10th Cir.1998) (arguments inadequately briefed in opening brief waived and bold assertions that there are genuine issues of material fact insufficient for reversal of summary judgment) (quotations omitted).

We review the district court's grant of summary judgment de novo, applying the same standards as did that court. *McKnight v. Kimberly Clark Corp.,* 149 F.3d 1125, 1128 (10th Cir.1998). Summary judgment is appropriate only when an examination of the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Insofar as the complaint was dismissed as to the unserved defendants as either frivolous or for failure to state a claim on which relief can be granted, we also review this decision de novo. *See Perkins v. Kan. Dep't of Corr.,* 165 F.3d 803, 806 (10th Cir.1999).

[2] With regard to plaintiffs first two arguments, the allegations of rape by another inmate and of supposed violations of a United Nations Treaty were first raised in plaintiff's Rule 60(b) motion, long after the district court had granted defendants' motion for summary judgment. In addition, the time and place of this alleged assault are not specified, nor is it connected to any specific defendant. Because these claims were not part of the claims ***830** considered by the district court and because they are vague and conclusory, we will not consider them here.

[3] With respect to plaintiff's claimed use of excessive force in violation of the Eighth Amendment, there is no indication on the record of any use of force beyond mere pushing and shoving, which does not give rise to a federal cause of action. *See Hudson,* 503 U.S. at 9-10, 112 S.Ct. 995.

[4] Finally, plaintiff claims the district court violated certain procedural rules. He contends that according to his records, none of the defendants named in his complaint have ever been served. *See* Appellant's Br. at 8. This of course overlooks the fact that defense counsel accepted service on behalf of the eleven defendants named in the original complaint. Insofar as he complains of the district court's special order of reference to the Chief Bankruptcy Judge for the limited purpose of conducting a telephone conference to inquire into the nature and scope of plaintiff's claims, the district court's authority for this unusual procedure is unclear; however, it is apparent from the subsequently filed report that the bankruptcy judge did nothing of substance and, more importantly, that plaintiff was in no way delayed or prejudiced by this action. The balance of his procedural arguments are without merit.

****4** [5] In the second appeal, No. 00-1210, plaintiff seeks review of the denial of his motion ostensibly brought pursuant to Fed.R.Civ.P. 6(b) and 60(b). Rule 6(b) governs the time for filing documents and the circumstances under which an enlargement of time for filing may be granted. To the extent plaintiff appears to seek an enlargement of time to object to the magistrate judge's report and recommendation, the rule is inapplicable because the district court had accepted the magistrate judge's report and recommendation and dismissed the action before the motion was filed.

[6][7] A Rule 60(b) motion is addressed to the sound discretion of the district court. *See New England Mut. Life Ins. Co. v. Anderson,* 888 F.2d 646, 652 (10th Cir.1989). Here, the district court correctly concluded that plaintiff's post-judgment motion did not challenge either the decision of the

court or the recommendation of the magistrate judge, but merely sought to either file a new § 1983 complaint or to amend the one underlying the dismissed action. Moreover, plaintiff's arguments on appeal are addressed to the dismissal of his complaint, not the district court's post-judgment ruling on the Rule 60(b) motion. Accordingly, any challenge to this ruling is deemed waived. *See Adler,* 144 F.3d at 679.

[8] We have considered the balance of plaintiff's arguments in light of the record and find them to be without any legal merit. We further find that both these appeals are frivolous and subject to dismissal under the provisions of 28 U.S.C. § 1915(e)(2)(B)(i). Plaintiff is advised that each of these dismissals counts as a separate prior occasion under § 1915(g). *See Jennings v. Natrona County Det. Ctr. Med. Facility,* 175 F.3d 775, 781 (10th Cir.1999). In addition, we affirmed the district court's dismissal, for failure to state a claim on which relief could be granted, of a similar civil rights action filed by plaintiff in *Sims v. Hickok,* No. 99-1110, 1999 WL 448824, at *2 (10th Cir. July 2, 1999), which also qualifies as a prior occasion under § 1915(g). *See Jennings,* 175 F.3d at 780. Accordingly, plaintiff now has had three dismissals for purposes of § 1915(g) and "may not proceed *in forma pauperis* in any future federal lawsuits, other than habeas, which do not involve imminent danger of serious physical injury." *Id.* at 781 (further quotation omitted). Plaintiff is reminded of his continuing obligation to make partial ***831** payments until the docketing fees are fully paid.

APPEALS DISMISSED.

C.A.10 (Colo.),2001.
Sims v. Miller
5 Fed.Appx. 825, 2001 WL 201946 (C.A.10 (Colo.)), 2001 DJCAR 1133

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